STATE OF ISRAEL

COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY

REPORT

PART ONE

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TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

		Page
1.1 – 1.5	Appointment of the Commission and Particulars of its Proceedings	1 – 3
1.6	Subjects of the Commission's Inquiry	3
1.7 – 1.9	The Crisis in the Service and the Necessity for Reform	3 – 4

CHAPTER TWO: DESCRIPTION OF FACTS

2.1 – 2.8	The Nafsu Case	6 – 10
2.9 – 2.10	The Terrorist Organizations and the "Armed Struggle"	11 – 12
2.11	The Hold of the Terrorist Organizations on the Local Population	13
2.12	Smuggling of Materiel. Local Organizing	13
2.13	Political Subversion	13
2.14	Activities of the Service in Foiling HTA	15
2.15	Difficulties in the Struggle against HTA	15
	Description of GSS Activity	
2.16	Developments since the Six Days War	16
2.17	Collection of Information as First Priority	16
2.18	GSS Investigation compared with Police Investigation	17
2.19	Central Importance of Truthful Confessions	18
2.20 – 2.21	Particulars on Prevention of HTA	19
	False Testimony in "Trials within a Trial"	
2.22 – 2.24	Until 1971 and since then	20 – 22
2.25	The Need for Compartmentalization	22

		Page
2.26 – 2.28	The Dilemma and its Solution in the Investigators' View	23
2.29	The Instruction to tell the Truth – a dead Letter	24
2.30 – 2.31	How did the System take Root	25
2.32	Insistence on telling the Truth within the Service	26
2.33	The Abolition of the System	26
2.34 – 2.35	Confusion amongst Investigators at present – Interim Arrangements	28
2.36	Cracks in the System	29
2.37 – 2.39	The Reasons for Giving False Testimony	29 – 30
2.40 – 2.42	Rationalizations for Committing Perjury	31 – 32
2.43 – 2.46	Who knew about the Existence of the Method	33 – 34
2.47	The Nafsu and No. 300 Bus Cases in the Context of Perjury	34
2.48 – 2.52	Who bears Responsibility	35 – 39
2.53	Conclusion	39
	Preservation of Records	
2.54	The Former Practice	41
2.55 – 2.56	Judgments on the Subject	41 – 42
2.57 – 2.58	Procedure following the Abu Sneina judgment	43 – 44
2.59	Control and Supervision within the Investigators Unit and by the Comptroller of the Service	44
2.60	Investigation Premises	45
2.61	Medical Attention	46

CHAPTER THREE: LEGAL AND MORAL ASPECTS

3.1	Definitions of HTA Offences	48
3.3	The Constitutional Status of the Service	49
3.4	Limitations according to Law	50
3.5	The Judges' Rules	51

		Page
3.6	Limitations under Internal GSS Directives	52
3.7	Pleas in the Interrogator's Defence. Superior Orders	53
3.8 – 3.10	The Defence of "Necessity"	53 – 54
3.11 – 3.12	The three Conditions for the Defence of Necessity	55 – 56
3.13 – 3.15	Details of the three Conditions	58 – 60
3.16	Care in making use of the Defence of Necessity	61
3.17	The Dilemmas of a Liberal State	62
3.18	Admissibility of a Confession as Evidence in Court	62
3.19	Judicial Decisions of the Supreme Court on this Subject	64
3.20	Additional Legislation: Arrest and Release on Bail, Meetings with Lawyer, Information about Detention, Meetings with Relatives. Visits by Red Cross Representatives	66
3.21	International Conventions	68
3.22	Complaints about Violations of the European Convention on Human Rights – Judgment on the Complaint by Ireland against the United Kingdom	68
3.23	Complaints against Greece	70
3.24	The Fourth Geneva Convention	70
3.25	Reports on Northern Ireland	71
3.26	The Compton Report	71
3.27	The Parker Report	72
3.28	The Diplock Report	73
3.29	The Bennett Report	75

CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

4.1	General	77
4.2 – 4.5	The Correct Solution from amongst Three Solutions	77 – 79

		Page
4.6	Means of Pressure against the Person Interrogated	79
4.7 – 4.8	A Code of Guidelines for the Interrogator	80
4.9	Investigation Premises	81
4.10	The Farah Premises	81
	Conclusions and Recommendations on Law and Legislation	
4.11	The Service's Proposal for Legislation	82
4.12	Arrangements within the Existing Law	82
4.13	On Lawful Methods of Interrogation of Suspects of HTA	82
4.14	On the Admissibility in Court of Confessions by Persons Interrogated	83
4.15	Testimony of Investigators in Court. The Problem of Privileged Evidence	84
4.16	Administrative Orders	85
4.17	Amendment of Legislation	86
4.18	Control and supervision	87
4.19	Internal Supervision External Supervision	87
	(a) Disciplinary and Criminal Sanctions	87
	(b) The Status of the Attorney General	88
	(c) The State Comptrollers' Functions	88
	(d) The Ministerial Echelon and the Foreign Affairs and Defence Committee	89
4.20	Criminal Proceedings for Acts by GSS Investigators in the Past and for False Testimony by them	90
4.21	Liability in Tort	91
4.22	Expected Criminal Complaints	91
4.23	Considerations in that regard	92
4.24	The Report by the Commission of Jurists of 1963	93
4.25 – 4.26	The Power of the Attorney General to Stay Criminal Proceedings	94

		Page
4.27	No Recommendations for Disciplinary Conclusions	95
4.29	Section 15 of the Commissions of Inquiry Law	96
4.30	Applications for Retrial	96
4.31	Claims for Costs and Compensation from the State Treasury	97
4.32	Legal Adviser to the Service	98
	Expressions of Appreciation to the Coordinator of the Commission and to its Staff	

Chapter One: Introduction

1.1 On 31 May 1987, The Government of Israel resolved:

> "That the matter of the GSS methods of interrogation regarding Hostile Terrorist Activity (HTA) is – in the wake of Criminal Appeal 124/87 (Nafsu) – a subject of vital public importance at this time which requires elucidation."

Therefore the Government decided:

> "To establish a Commission of Inquiry, in accordance with Sec. 1 of the Commissions of Inquiry Law, 1968, regarding the investigation methods and procedures of the GSS on HTA, and the giving of testimony in court in connection with these investigations.
>
> "The Commission will make recommendations and proposals, as it sees fit, also regarding the appropriate methods and procedures concerning these investigations in the future, while taking into account the unique needs of the struggle against Hostile Terrorist Activity."

The Government also decided that:

> "Because the subjects of the investigation obligate secrecy, to apply to the Commission Sec. 23 of the Commissions of Inquiry Law, with the exception of subsections (1) and (6)... The Commission of Inquiry shall decide regarding publication of its report according to Sec. 20 of the Commissions of Inquiry Law."

On 1 June 1987 the Knesset's Defense and Foreign Affairs Committee confirmed, in accordance with Sec. 23 of the law, "that the subject of the inquiry and the deliberations of the Commission of Inquire require secrecy."

On 2 June 1987 the President of the Supreme Court, in accordance with Sec. 4(a) of the Law, appointed the undersigned, Justice (retired) Moshe Landau as Chairman of the Commission, and Judge (retired) Ya'akov Malz (currently the State Comptroller) and Major General (res.) Yitzhak Hofi as the members of the Commission. The Commission appointed Judge Alon Gillon as coordinator.

1.2 This report, which is herewith submitted to the Government in accordance with Sec. 19(a) of the Law, and to the Defense and Foreign Affairs Committee according to Sec. 23(5), was adopted by the Commission unanimously. It contains two parts: a first part which will be made public according to Sec. 20(a) of the law, and a second part which will not be published, since the Commission was convinced that this is required in order to preserve State security.

1.3 The Commission held 43 sessions in which it heard 42 witnesses, among them Prime Ministers, personnel of the General Security Service (henceforth: GSS) – from the Heads of the GSS and others of its personnel in the present and the past, to the level of investigation in the field – staff of the civilian and military legal service, other public officials, as well as experts in various fields and persons who were interrogated by GSS interrogators. The Commission also visited GSS investigation premises. It received considerable written material from the GSS, both at the initiative of the GSS and in response to requests of the Commission, all of which were fulfilled. The Commission also received written material at its request from other State authorities. At the outset of its work the Commission published a notice in the press inviting the public to apply to it in writing regarding the subject of its inquiry. This notice elicited 56 written responses to the Commission from individuals, lawyers and organizations (the Association for Civil Rights in Israel, and Amnesty International). The Commission addressed itself to these responses and did what it felt was necessary regarding them.[1]

According to its Letter of Appointment, the Commission did not regard it as its duty to enter into a clarification of every specific complaint that was addressed to it. It did so only by way of sample, if this could shed light on the GSS methods of investigation.

1.4 The Commission found in necessary to collect legal material which it required for its inquiry. This task was entrusted according to Sec. 13 of the

[1] At a late stage, on 11.9.87, the Commission received a telephone call on behalf of the Head of Mission in Israel of the International Red Cross who requested to meet the Chairman of the Commission. The Coordinator of the Commission explained to the caller that according to the procedure of the Commission the apprach to it had to be made in writing. No such communication from the Red Cross was received by the Commission.

Law, to Ms. Rachel Suchar, Director, Criminal Department, State Attorney's Office, and she discharged her duties with commendable discernment and devotion.

1.5 At the request of the GSS, the Commission allowed Col. (res.) Zvi Terlo to sit in on its sessions as an observer only, on behalf of the GSS, under conditions laid down by the Commission. Beyond this permission which he was granted, Col. Terlo gave the Commission important help in the presentation of the written material which the GSS submitted to the Commission, and in presenting the views of the GSS on various legal problems, at the conclusion of the taking of evidence by the Commission.

1.6 Its Letter of Appointment required the Commission to deal with two subjects: the investigation methods and procedures of the GSS on Hostile Terrorist Activity, and the giving of testimony in Court regarding these investigations. As the ground for the appointment of the Commission, the Letter of Appointment cited the Nafsu case which was heard by the Supreme Court in Criminal Appeal 124/87. The exposure of the facts regarding the GSS methods of interrogation, in the Supreme Court's judgment in the Nafsu case severely undermined the public's confidence in the GSS, and in parallel, caused immense confusion, to the point of a danger of a loss of direction, within the GSS itself. We shall note at once that those directly involved, namely GSS investigators and legal advisers and their superiors, constitute a small minority of the total GSS personnel. But because the Investigators Unit is an integral part of the GSS, the injury and the confusion spread throughout the GSS.

1.7 This was not the first shock sustained by the GSS; it was preceded by the shock of the affair known as the No. 300 Bus Affair, which was perhaps even more painful. According to our Letter of Appointment, we were not to deal with that affair, which ended on 25 June 1986 when the President pardoned eleven GSS personnel, among them members of the GSS senior personnel, followed by the resignation of most of them from the GSS, including the then head of the GSS, Mr. Avraham Bendor (Shalom). But we shall not be wrong in saying that it was the very grave failure of these persons, with respect to their criminal conspiracy to subvert the deliberations

of, and mislead the committees that investigated that affair, which prepared the ground for the revelations that attended the Nafsu affair: once confidence was so badly shaken as a result of the first affair, it was no longer possible to cover up the manifestations that were exposed in the Nafsu appeal.

1.8 The investigation staff of the GSS is characterized by professionalism, devotion to duty, readiness to undergo exhausting working conditions at all hours of the day and night and to confront physical danger, but above all by high inner motivation to serve the nation and the State in secret activity, with "duty being its own reward", without the public glory which comes with publicity. It is all the more painful and tragic that a group of persons like this failed severely in its behaviour as individuals and as a group. In saying this we are not referring to the methods of interrogation they employed – which are largely to be defended, both morally and legally, as will be explained below – but to the method of giving false testimony in court, a method which has now been exposed for all to see and which deserves utter condemnation. The revelation of this method increased the crisis of confidence in the GSS's moral fibre, which had begun earlier, and it is undermining the sense of self-confidence and self-respect of every GSS officer. This evil must be eradicated, for it is a matter of life and death for us all, in the full sense of the term.

1.9 We are convinced that today recognition of the necessity to turn a new leaf and to rehabilitate the standing of the GSS in the eyes of the public and in the eyes of its own personnel, extends to every person in the GSS, from its senior personnel, under the leadership of the current Head, to the most junior interrogator. We see a first step toward this essential catharsis of the GSS from its failings, in the disclosure of the whole truth which marked the testimony of the GSS personnel who appeared before us. They opened their hearts to us and admitted their errors without hiding anything, and we believe in the sincerity of their intentions to set straight what was twisted. The interim period in which the GSS has been awaiting the report of this Commission has lasted until today. We regard our principal function as being to guide the essential process of rehabilitation and healing with regard to the GSS activity on HTA, by integrating this vital activity into the framework of

the values of the rule of law which the State of Israel espouses. We hope that in this way the GSS personnel will have restored to them their inner conviction of the rightness of their way, which they require for their work, and the ability to distinguish between right and wrong, without needing the help of a legal expert at every step and turn.

Chapter Two: Description of Facts

The Izzat Nafsu Case

2.1 Since the Nafsu case was posited as the point of departure for the appointment of this Commission, it is proper to open with a concise description of its main points. To this end, we must turn to the description of the facts in the Supreme Court's judgment in Criminal Appeal 124/87 of 24.5.87. This appeal was submitted by Izzat Nafsu, by leave of the President of the Supreme Court, in accordance with Sec. 440–9 of the Military Jurisdiction Law, 1955. The findings of facts in the appeal were determined on the basis of the appellant's admission before the Supreme Court of facts which constitute an offence of exceeding authority to the point of imperilling State security, under Sec. 73(a) of the Military Jurisdiction Law 1955. The Prosecution, for its part, agreed to have the Special Court Martial's judgment of 29.6.82 set aside, in which the appellant was also convicted of grave offenses of treason, espionage, and aiding the enemy during wartime, for which he was sentenced to 18 years' imprisonment from the day of arrest, 4.1.80, and dismissed from the Army. It also agreed to have the Military Appeals Court's judgment given on 29.6.86 set aside. Instead, the Supreme Court sentenced the Appellant to 24 months' imprisonment, and demoted him from lieutenant to sergeant-major. Before convicting the Appellant of the offence, the Supreme Court convinced itself, on the basic of a thorough clarification that it conducted with the appellant in court, that his confession before the Court was a truthful one.

2.2 As stated in the Supreme Court's judgment, Nafsu maintained in a "trial within the trial" held concerning the confessions he gave to his interrogators in 1980, that during his interrogation GSS interrogators committed acts of violence against him, which included pulling his hair, shaking him, throwing him to the groud, kicks, slaps and insults. He was ordered to strip and was sent to take a shower with cold water. He was prevented from sleeping for hours at a stretch, during the day but chiefly at night, and was forced to stand in the yard of the prison premises for long hours also when he was not being interrogated. He was also threatened with

the arrest of his mother and wife, as well as with the publication of personal information about himself that the interrogators possessed.

These allegations were denied in the testimony under oath of the interrogators, headed by the person who at that time was Head of the GSS Interrogation team which investigated Nafsu's case. The Court Martial preferred their denial over Nafsu's testimony, and after weighing the evidence, in a very detailed judgment, it accepted Nafsu's confessions as truthful and lawfully obtained, and convicted him – principally on the basis of these confessions – on all the counts of the indictment, including the smuggling of combat materiel for a terrorist organization from Southern Lebanon into the country.

2.3 In its Judgment, the Special Court Martial rejected Nafsu's allegations concerning violence exerted on him and threats made against him. The Judges did not desist from this belief, even though they discovered false denials by the interrogators concerning the interrogation of others, as well as concerning certain details relating to the interrogation of Nafsu himself. Nor was the Military Appeals Court impressed by the Defence's arguments, and it added a reprimand in sharp terms of the defence for daring to attack the interrogators' testimony.

2.4 Some time before the Military Appeals Court gave its Judgment, the criminal conspiracy entered into by several senior GSS personnel to obstruct the proceedings of committees investigating the bus affair which occurred on 12.4.84, was revealed. In this conspiracy, a senior GSS official, Mr. Yossi Ginnosar, acted as a "Trojan horse" on the Zorea Committee, as a committee member sitting with Maj. Gen. (res.) Zorea. This Committee submitted its report in May 1984. Afterwards, a team headed by the State Attorney Mr. Y. Blattman, was also misled, through coordinated obstruction in the form of false testimony to that team, which submitted its Report in July 1985. When this disgraceful conspiracy was revealed, the doubts among GSS personnel concerning the justness of Nafsu's conviction, which had existed here and there in the GSS already beforehand, increased, and in January 1987 the new GSS Head at his initiative ordered that an internal investigation be conducted to reexamine this case. In this investigation, the

interrogators admitted the validity of most of Nafsu's claims in the trial concerning means of pressure exerted on him, with the exception of his contentions regarding blows and slaps. As a result, prior to the hearing of the appeal by the Supreme Court, an agreement was reached between the Chief Military Advocate, who represented the Prosecution in the appeal and who had also investigated the case himself, and the Defence. In the agreement the Prosecution, with the concurrence of the Attorney General, agreed to annul the judgments of the first two instances, after admitting that because of the means of pressure exerted on Nafsu, it could no longer be argued that the confessions obtained from him were admissible and credible. The appellant Nafsu for his part confessed, in accordance with the agreement, to the lighter offence of which he was convicted by the Supreme Court, as noted above. The Supreme Court's decision concerning his guilt and the degree of his guilt now conclusively constitutes resiudicata.

2.5 In the above-mentioned internal investigation, which was conducted in February 1987, Nafsu's interrogators maintained that in using means of pressure they had not gone beyond what was allowed to them in the GSS directives that existed at the time, and – what was even graver – they claimed that even in giving false testimony at the trial within the trial, in which they denied having exerted such pressures, they also had not deviated from accepted practice in the GSS, and this with the knowledge of their superiors. These contentions on the part of the interrogators drew not one word of reservation by anyone taking part in the internal investigation. With regret and shame, we must find that these claims concerning permission to employ pressure, together with the related "norm" of giving false testimony in Court, were proved to us to be correct (although permission to use physical means of pressure was greatly reduced in the years since 1980, as detailed in the second part of this report). We shall elaborate on this matter below.

2.6 From these points of view, then, the proceedings in the Nafsu trial – and particularly the false testimony given in the trial within the trial – were no different from what occurred in other such trials in which GSS interrogators testified. Yet this should not be considered the main factor underlying the perversion of justice due to which Nafsu was imprisoned for

years, beyond the 24 months to which he was finally sentenced by the Supreme Court.

As will be explained below, the GSS is very scrupulous about not accepting from persons under interrogation false confessions concerning untrue facts. The aim is to obtain a true confession, using psychological pressure if need be, and sometimes even physical pressure, such as was exerted against Nafsu. Any false confession, mistakenly believed to be true, disrupts – for obvious reasons – the GSS's methods of struggle to foil Hostile Terrorist Activity. It is for this reason that a thorough comparison is made between the information obtained in a confession with information obtained from other suspects and with information in the hands of the GSS from privileged sources, which cannot be revealed to the Court.

2.7 This was not the case in the Nafsu affair. Here credible secret evidence was almost totally lacking, since the main witness, an informer who had provided information against Nafsu, had been termed a "dyed-in-the-wool liar" by the interrogators. He was not brought to court to testify. The only additional testimony which supported the confession of Nafsu himself, was in fact the testimony of that same informer's wife, which was accepted as reliable. For this reason Nafsu's interrogators were prepared to release him at a certain stage of the investigation. But in the end, the results of Nafsu's polygraph test – which his investigators at the time believed indicated a sense of guilt – were decisive. The trouble is that this case can serve as an example of the risks involved in unreservedly relying on the interpretation of polygraph tests, since recently the results of Nafsu's test were re-examined and it was found that due to his character, he should be considered "unexaminable" – in other words, the polygraph test proved nothing.

At the time a great deal of effort was devoted to the Nafsu investigation, taking into consideration his status as an IDF officer accused of such severe offences of treason and spying. Basic disagreements emerged among the eight interrogators who took part in the various stages of the investigation: two of them believed that Nafsu was entirely innocent, another found that he had committed all the offences of which he was accused, the head of the team himself had doubts as to Nafsu's guilt of the most serious of the counts

against him: smuggling combat materiel into Israel. These differences are well reflected in a final, comprehensive report drawn up at the conclusion of Nafsu's interrogation. The summation was unusual in comparison with the customary procedure in GSS interrogations, since it contained no clear conclusion as to Nafsu's guilt and its degree. (These differences among the interrogators, including also the matter of interpretation of the polygraph test, exist to this day, as we learned from their statements in their testimony before us).

In view of the differences among the interrogators, the then GSS Head decided to submit the material gathered to the Chief Military Advocate's office for a decision on whether Nafsu should be brought to trial, and on which counts. However, not all the material was submitted to the Military Advocate's office, nor was it explained to that office that a minority opinion existed regarding Nafsu's guilt in the above-mentioned final report (see the Court Martial's judgment, pp. 66-67, and the judgment of the Military Appeals Court, p. 6). Only later, at the defence's demand, did the GSS submit the final report to the Court. Incomplete disclosure of this nature to the Prosecution was also regular GSS practice and the justification advanced for that was the need for absolute compartmentalization of information, as will be evident later. The Court was critical of this "filtering" of the material submitted to the Military Advocate's Office (p. 67). But this too did not suffice to shake the Court's belief in Nafsu's confessions and the version according to which be was guilty on all counts. The Prosecutor at the trial did not know about the pressures brought to bear upon Nafsu, because the GSS interrogators and legal advisers concealed these as well from the Military Advocate, in accordance with accepted practice in the GSS. (See also below, Sec. 2.43.)

If these pressures had been revealed to the Court, it might have influenced the stand taken by the Military Prosecution and, ultimately, the Court's conclusions regarding Nafsu's guilt. In this matter, at least, the Court was misled by the GSS, through the Military Prosecution, which acted in this respect as the unwitting agent of the GSS.

2.8 To sum up: this case serves as an alarm and a warning, not only

because of the miscarriage of justice to Nafsu himself, but no less because of the corruption inherent in perjury, which was exposed to the light of day and which must now be wholly eradicated.

The Terrorist Organizations and "The Armed Struggle"

2.9 We have heard testimony and read exhaustive reviews about the development of Hostile Terrorist Activity (HTA) in the territories and in Israel. It may be said, concisely, that the objective of the terrorist organizations is the destruction of the State of Israel, by means of terrorist acts and disruption of normal life.

Arafat's Fatah, which began to operate in 1965, remains the veteran and dominant of the Palestinian organizations, and it is also the chief component of the "Palestinian Liberation Organization" (PLO). Fatah is the progenitor of the idea of "the armed struggle," as a systematic and methodical conception in its "Palestinian Convenant" (1968). Article 8 of the Covenant states:

> "The Palestinian people is at the stage of national struggle for the liberation of its homeland. For that reason, differences between Palestinian national forces must give way to the fundamental difference that exists between Zionism and imperialism on the one hand and the Palestinian Arab people on the other. On that basis, the Palestinian masses, both as organizations and as individuals, whether in the homeland or in such places as they now live as refugees, constitute A SINGLE NATIONAL FRONT WORKING FOR THE RECOVERY AND LIBERATION OF PALESTINE THROUGH ARMED STRUGGLE."
>
> Article 9: "ARMED STRUGGLE IS THE ONLY WAY TO LIBERATE PALESTINE. Thus it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life

in Palestine and to exercise their right to self-determination and sovereignty over it." [Emphases added by the Commission.]

We must therefore see straightforwardly that as long a Fatah retains this doctrine, the path of violence remains in its view the only path. And indeed, this was stated again in the concluding political Statement of the 18th session of the Palestine National Council, held last Spring (1987) in Algeria:

> "On the basis of the Palestinian National Covenant, and out of a commitment to the resolutions of the Palestine Nactional Council, we stress the following elements as a basis for Palestinian national action within the framework of the PLO, the sole legitimate representative of the Palestinian people."
>
> "On the Palestinian level: continuation of the struggle in all its forms, a armed mass and political struggle, in order to realize the national goals and to liberate the Palestinian and Arab lands from the Israeli occupation..."

On this issue, the other Arab terrorist organizations concur with Fatah: "The Popular Front for the Liberation of Palestine," headed by George Habash, with its dogmatically Marxist ideology, and Naif Hawatmeh's "Democratic Front for the Liberation of Palestine," which recently joined the PLO, also preach the "armed struggle" in all the territory of Eretz-Israel; and the same holds good for other organizations of the "Rejection Front."

2.10 This doctrine of destruction of the State and the killing of its citizens is no mere proclamation. We are witness to the fact that the terrorist organizations spend their maximum efforts to perpetrate terrorist acts on an continuous basis, in order to realize their doctrine. They draw no distinction between military and civilian targets: the "armed struggle" is conducted against every possible target. Some of them declare publicly that there is no difference between a military and a civilian target, since both serve Israel's "aggressive policy." Others disguise attacks on civilian targets with the claim that all the targets they attack are military or intelligence targets. For the purpose of "the armed struggle," the terrorist organizations have

perpetrated terror attacks of mass murder in public places, such as public transportation, public squares and markets, movie theaters, and bathing places.

The overwhelming majority of the acts of terrorism are planned by terrorists across the "Green Line," to be perpetrated on the territory of the Sate. The attacks are perpetrated with extreme brutality, indiscriminately against men, women and children; every human target serves their aims. They also deal in terrorism on an individual basis: against Jews, soldiers, security personnel and civilians, as well as against Arabs suspected by terrorist organizations of collaborating with the Israeli authorities. They pursue their schemes relentlessly.

According to the method of the terrorist organizations, terror, or what they call "the armed struggle", abets the coalescence of the natural identity of the Palestinians, wherever they are. It aids in expanding the ranks of the organizations themselves with new recruits, and it is designed to undermine the morale and security of the State's population. It also underscores the presence of the organizations in the regional and international arenas. Their tactical objective is to arouse the Arab population in the territories and in Israel to violent open revolt against the State.

2.11 Although the percentage of the total population in the territories (a little less than one million persons in Judea and Samaria and slightly over half a million in the Gaza District) involved in HTA and subversion against the State is minute, and the overwhelming majority of this population prefers to live a quiet working life, the terrorist organizations enjoy the overt or covert sympathy of the majority of the Arab population in the territories. They strengthen their hold over it and terrorize it by murdering those who dare to take an independent stand on the issue of relations between this population and the State of Israel, and on the possibility of a political solution.

The terrorist organizations' control also penetrates the walls of the jails where Arab prisoners are held. A harshly violent internal regime of leadership on behalf of the organizations exists within them, which engages in indoctrination and the recruitment of new members. It receives its orders

from organization HQs on the outside, and carries them out – to the point of executing prisoners suspected of collaborating with the Israeli authorities.

2.12 As noted, the bulk of the terrorist activity in Israel and the territories is directed by the HQs of terrorist organizations across the borders of the State. They also try to smuggle materiel (weapons and explosives) into the area of the State. In the past the 'open bridges' on the Jordan River were a convenient channel for this purpose. In recent years effective measures have been taken to hamper this transfer of materiel (although it has not been halted altogether) and supervision of the borders has been improved. As a result, there has been an upswing in the use of locally manufactured, improvised weapons to perpetrate terrorist attacks, and an increase in the use of weapons other than firearms (knives) against Jews. A considerable part of this activity is carried out by groups which have organized at local initiative, without any guidance from terrorist organization centres across the borders. With the passage of time, a local group of this kind could be integrated into one of the established organizations. Recent years have seen an increase in disturbances, rock-throwing and the hurling of Molotov cocktails at vehicles, acts the evil effects of which can cause the death of persons travelling on the roads. Those engaged in these activities are chiefly youngsters below the age 18, and even 14-year-old children.

2.13 Political Subversion – is currently an important component of PLO activity in the territories. It may include acts of support for a terrorist organization, publication of praise, sympathy or encouragement for violent terrorist acts, or actions, involving the public expression of identification with such an organization, or maintaining contact with operatives of a terrorist organization. (See Sec. 4 of the Prevention of Terrorism Ordinance, 1948, and, in the territories, the Order [No. 101] Concerning the Prohibition of Acts of Incitement and Hostile Propaganda.) Public "front" bodies have been set up to operate among the masses, especially the young generation, and students play an important role in this regard. These bodies receive their orders from the PLO, and their members constitute a convenient human base and reservoir for recruitment for terrorist activity. Recent years have in fact seen an increase in the number of organized groups of young people in the territories from among the political subversion activists whose members

shifted from the phase of open sympathy and incitement to that of actual terrorist attacks.

2.14 The State authorities whose function it is to combat, foil and prevent Hostile Terrorist Activity inside Israel are: the IDF, the Israel Police and the GSS. The IDF's role is to prevent the infiltration of terrorists and weaponry from across the borders of the territory under Israel's control. The war against terrorism inside the borders of the State devolves primarily on the GSS. We shall describe briefly the organizational structure of the GSS and of its Investigation Unit, and then survey the history of the war against HTA in the last two decades, its problems and achievements. This will bring us to the major topics of our discussion, namely the GSS's interrogation methods and procedures and the interrogators' testimony in court. Some of the discussion must be incorporated into the second, classified part of this Report, while some will appear in this part, which is being made public.

2.15 As the ideology adopted by the various organizations crystallized through the years, compartmentalization among and within the organizations increased greatly, and professional training for underground operations and coping with interrogation was expanded. Moreover, some of the terrorists active in the territories have already experienced detention and interrogation, including some who have completed their prison terms, and others who were released as part of [prisoner] exchanges. The prisons themselves serve as a hothouse of organizing, ideological indoctrination and professional training, including guidance on how to cope with GSS interrogators.

These facts pose numerous difficulties and obstacles in the continuous battle to foil HTA. The GSS has had to confront and persist continuously in this campaign for long years and in changing circumstances, and to improve the tools and methods at its disposal in order to accomplish its mission successfully.

It bears noting that there appears to be no end in sight to terrorist activity, which means that in the foreseeable future this will continue to be the principal and onerous task facing the GSS – especially those of its personnel who are directly engaged in these fields.

Description of GSS Activity

2.16 A description of the tasks and structure of the GSS we include in the second, classified, part of this Report.

Israel's control of the territories in the wake of the Six Days War brought about an upheaval in the scope and activities of the Investigation Unit. Until then, there were only a very limited number of investigations aimed mainly at thwarting expionage, hence only a very small number of interrogators were needed. Following the war, the unit suddenly found itself facing a surging stream of Hostile Terrorist Activity and hundreds of persons to interrogate. The unit was unprepared to cope with these developments, and in the first stages, it acted in an unorganized and improvised fashion. Gradually the unit deployed itself for more organized and institutionalized activity: the number of interrogators was considerably increased and patterns and procedures were laid down for its activity; premises for interrogation were allocated; ranks and responsibilities were defined; databases were formed; and soon the unit was more or less ready to handle the continuous war against HTA in an orderly fashion. Despite a number of failures, the unit's war proved itself to be extremely effective, and it registered, and is continuing to register, a large number of successes to its credit, both in foiling such activities and in locating those responsible after the event. Also during the very time when this Commission was holding its sessions, the vital activity of the GSS did not slacken, and it was able to uncover dangerous terrorist cells. It is no exaggeration to say that many citizens of this country owe their lives and security to the GSS in general and to its Investigation Unit in particular.

2.17 The GSS has always attached the utmost importance to collecting information for preventing and thwarting [HTA]. Obtaining evidence for the trial of those interrogated did not have top priority in the work of the interrogators.

A ranking GSS official who testified before the Commission put it this way:

> "The network that deals with all of this is mainly a collecting system. In the end, we thought, and we still think today, that the tool of

interrogation is a system for collecting intelligence information. This also explains, albeit very partially and perhaps not very convincingly, why we were less interested in, or why we cared less about putting them on trial, because after catching the person responsible and solving the crime, I go on to the next stage – I go after the next suspect.''

This does not mean that Prosecution was shunted aside. The GSS has always considered putting terrorists on trial an important means of thwarting HTA. One of the GSS personnel described it thus in his testimony:

> ''From our point of view, obviously, the fact that the accused is convicted and jailed is part of the foiling process. The foiling element takes the form of the offender being 'neutralized' for the X years of his imprisonment. That is definitely foiling...''

2.18 Basic differences exist between the essence of a police interrogation of an ordinary criminal, on the one hand, and an interrogation carried out by the GSS of persons suspected of HTA or subversive political activity, on the other. The police investigation is aimed at collecting evidence against individuals within the society, suspected of criminal offenses, and its purposes are to have the accused convicted so that he will change his ways, to deter him and others from committing future crimes, and to give him the punishment he deserves. Whereas the direct goal of the GSS interrogation is to protect the very existence of society and the State against terrorist acts directed against its citizens, to collect information about terrorists and their modes of organization ond to thwart and prevent the perpetration of terrorist acts whilst they are still at a state of incubation, by apprehending those who carried out such acts in the past – and they will surely continue to do so in the future – and those who are plotting such acts, as well as seeking out those who guide them.

Another difference between a police investigation and one by the GSS is that when the police are trying to uncover a criminal offense they seek to collect evidence (testimonies from witnesses, real evidence, clues left at the scene of the crime, etc.) which will further the process of finding the culprit; whilst in a GSS Interrogation the investigator does not usually possess evidence of this

kind: eye-witnesses to acts of terrorism, such as the murder of a Jew in an Arab area, are unwilling to assist the investigators and generally even provide cover for the perpetrators because of the local population's sympathy for and fear of the terrorists. Only rarely is the perpetrator of a terrorist act caught red-handed.

GSS interrogations in terrorist cases are hampered by the determination of those interrogated not to reveal information known to them, as the result of ideological indoctrination which includes a thorough briefing on how to cope with an interrogation, with this coping as such being considered an act of bravery by the terrorist's organization. On the other hand, there is the fear of the person under interrogation that he will be attacked while still inside the prison if he reveals information known to him, and his unwillingness to cooperate with the interrogators which is fed by the hope that he will at all events be freed from prison early in a prisoner exchange, as has happened in the past.

Under these circumstances, the interrogation of an HTA suspect by the GSS turns into a difficult confrontation between the vital need to discover what he knows, based on a well-founded assumption, usually from classified sources, and the will of the person interrogated to keep silent and conceal what he knows or to mislead the interrogators by providing false information.

2.19 From the above it emerges that every time a truthful confession is obtained from a person under interrogation, then as distinct from the majority of criminal cases which are investigated by the Police, in HTA cases submitted by the GSS to the military or civil Prosecution, the accused's confession, as taken down from him and signed by him before a police interrogator, to whom the accused is handed over following the completion of his interrogation by the GSS interrogator – is almost always the main evidence against the accuded. Even if GSS interrogation personnel possess additional incriminating information against the suspect, this information often cannot serve as evidence in court, either because it is inadmissible under the laws of evidence or because the harm liable to be caused by its disclosure outweighs the benefit of bringing it before the court. Hence the

major importance of obtaining a trutful confession from an accused on trial for terrorist acts.

2.20 As noted above, in the past twency years the GSS has scored considerable achievements in protecting the State and its citizens from HTA. As for terrorist attacks that were carried out, the perpetrators were captured sooner or latter in 80-90 percent of the cases. Of the tens of thousands of interrogations carried out by the GSS during the period in question, some 50 percent were brought to trial on an annual basis. Most of the other suspects were released after the interrogation, with administrative measures such as detention, restriction, expulsion etc. taken against a minority of them whom it was impossible to bring to Court due to the secrecy of the reliable information against them. The overwhelming majority of those tried were convicted on the basis of their confession in court; as for the rest – also quite a large number – trials were held in which they pleaded not guilty and evidence was heard.

2.21 In the second part of this Report we have included as appendices a number of charts depicting the GSS manpower status in the Arab sector; the number of HTA suspects interrogated as compared with the number of GSS interrogators; the number of attacks, persons interrogated and cases solved on an annual basis; the number of killed and wounded (Jews and Arabs) in terrorist attacks on a regional and annual basis; terrorist groups that were uncovered (both before and after attacks); details on the organizational affiliation of uncovered terrorist groups; quantities of materiel of various types seized, on an annual basis; and a comparative chart containing data on the number of suspects who confessed during interrogation and the number of those brought to trial from 1983–4 to 1986–7.

This is followed by a survey – also included in the second and secret part of this Report – of the interrogation methods applied by the GSS to HTA suspects from 1967 onwards, and of the permission given to interrogators from time to time to employ means of pressure, including physical pressure. Summing up the description of the development throughout the years of the grant of permission to use pressure, the Commission notes that among almost all those engaged in this subject the prevailing view is that recourse to some

measure of physical pressure in the interrogation of HTA suspects is unavoidable. The changes which occurred regarding this topic over the years – in the direction of both expansion and of reduction and prohibition, to the point where today the use of such means is greatly restricted – indicate soul-searching within the GSS stemming from moral inhibitions and a constant examination of the effectiveness of such methods, as against their necessity. The issue was also affected by outside complaints, by deviations from permitted methods, and by specific restrictions imposed by the political echelon.

The Commission goes on the devote a separate discussion, in the Report's second section, concerning failures which occurred in interrogations and deviations from the means the use of which was permitted, and the manner in which such deviations were handled.

False Testimony in "Trials within a Trial"

2.22 When the accused's confession during interrogation is the main evidence gainst him, the accused's plea of not guilty in Court is tantamount to an allegation that his confession was obtained by improper methods, and is therefore invalid and inadmissible as evidence against him. Such an allegation necessitates the conducting of a "trial within a trial" on the admissibility of the confession. Needless to say that in such circumstances, the "trial within a trial" constitutes the essence of the trial itself, and the verdict in it is in effect a decision in the entire trial, against the accused or in his favour.

The accused's confession as submitted to the Court is set forth as an orderly document detailing the accused's name and particulars, the name and particulars of the person who took down the confession, the place and time the confession was taken down, a statement noting that the accused was informed of his right not to say anything if he so wishes, and then the accused's statement. At the bottom of the statement, the person who took it down notes that the accused said what appears in the statement voluntarily and of his own free will, that the statement was read out to the accused – and

translated for him, if necessary – and that the accused confirmed its accuracy with his signature.

GSS personnel have never engaged in taking down such confessions. They interrogate the accused in their interrogation premises, when the main effort is directed toward inducing the accused to show readiness to give information and in the process admit to the acts attributed to him. Once this stage has been completed successfully and the suspect is actually ready to confess, he is handed over to a police investigator who takes down his confession in accordance with the law. This confession is subsequently presented in court by the policeman who took it down, and who appears as witness for the Prosecution.

2.23 According to Sec. 12 of the Evidence Ordinance (New Version), 1971:

> "Testimony of the accused's confession to having committed an offence shall be admissible only if the Prosecutor presents testimony concerning the circumstances in which the confession was made, and the Court finds that the confession was made voluntarily and of free will."

Up to the 1967 Six Days War the interrogation of Hostile Terrorist Activity (HTA) suspects, whose number wa small, was conducted according to the law and the Supreme Court's decisions of that time – without recourse to any physical pressure. Likewise, in the first years following the Six Days War, the Prosecution encountered no difficulty on this matter. Concerning the circumstances of obtaining and taking down of the confession, only the policeman who engaged in this at the end of the interrogation process would be brought to court to testify. He could testify in all good faith and conscience that at the stage in which he was involved, i.e. taking down the confession, everything went smoothly and the accused indeed made his confession voluntarily and of his own free will, as required by the law. The entire interrogation procedure preceding this stage, i.e. the interrogation by GSS interrogators, would not be raised in court at all, and no GSS interrogator was called as a witness in trials within the trial.

2.24 Such was the situation until 1971, when a fundamental change

occurred in trials within a trial. More and more defence lawyers began resorting in Court to the argument that the confession – ostensibly made to a policeman voluntarily and of the accused's own free will – resulted from improper methods used by GSS interrogators on the accused at the previous stage. These arguments forced the Prosecution, as part of the duty incumbent on it under Sec. 12 of the said Ordinance, to call GSS interrogators as witnesses for the Prosecution in order to have them testify on the circumstances of the interrogation and the making of the confession, and thereby refute the Defence's allegation that the confession had to be rejected.

As a result, since 1971 the phenomenon of GSS interrogators appearing as witnesses for the Prosecution in trials within the trial has become common. This, in turn, led to the grave phenomenon under discussion here – that of untruthful testimony by GSS interrogators in trials within the trial.

2.25 The GSS has always scrupulously observed a total compartmentalization of the activities of its personnel, which means that nothing concerning the work of GSS personnel is made known to anyone outside the GSS itself. This holds good with even greater force for what is done by interrogation personnel within the interrogation facilities. This rule is observed by the GSS strictly and uncompromisingly. In addition, the GSS Chief periodically reported to the political echelon – first to the Defence Minister and then to the Prime Minister, within the framework of frequent meetings between him and the GSS chief. Here, too, in the main general issues and matters of principle were dealt with without going into details. Now, for the first time, GSS interrogators found themselves facing a severe dilemma: On the witness stand they were asked questions about interrogation procedures to which they had to reply under oath or under warning. Like all other witnesses testifying in Court, they were bound by the law to tell the whole truth and nothing but the truth. Yet truthful testimony would violate the sacred principle of absolute compartmentalization inculcated into every interrogator from the moment he was received into the GSS. Truthful testimony required disclosing and uncovering what went on in the interrogation premises during interrogation, including an exposure of interrogation methods and, in consequence, the impossibility of employing these methods in the future, once they have been made known to the adversary. The methods in question

are numerous and diverse, including means of pressure applied against suspects.

2.26 The second part of this Report refers to the various types of pressure employed by interrogators against persons investigated. For our purposes here, suffice in to say that the pressure exerted – even if permitted at that time – was such as could be expected to appear to the court as violating the principle of the person's free will, and thus causing the rejection of the confession. In trials of the type discussed here such a rejection is tantamount to an acquittal of the accused.

Hence, as he stood on the witness stand, the GSS interrogator considered telling the truth as doubly dangerous, since it would involve a disclosure of interrogation methods and the application of physical pressure, and the rejection of the confession by the Court and the consequent acquittal of the accused. From the point of view of the GSS, each of these results was grave and undesirable – while GSS personnel were convinced, on the basis of reliable information, that the accused was indeed guilty as charged.

2.27 The solution found by the interrogators as a way out of this dilemma was, from their point of view, the simplest and easiest: They preferred the principle of total compartmentalization over the duty to tell the truth in Court, and, from the witness stand denied having exerted any physical pressure whatsoever on persons interrogated. Not to mince our words – they simply lied, thus committing the criminal offense of perjury under Sec. 237(a) of the Penal Code, 1977, which states:

> "A person who in a judicial proceeding knowingly gives false testimony as to a matter which is material to a question dealt with in that proceeding commits perjury and is liable to imprisonment for seven years..."

2.28 This, then, was the harsh dilemma the GSS personnel found themselves confronting since 1971, and this was the solution they found. Given the gravity of this dilema, it is extremely surprising that it was the interrogators themselves who had to find the solution that they found feasible – because the top command of the GSS gave the matter no institutionalized

and orderly consideration. When we heard the testimony of the man who was Chief in 1971 – and who remained in that post for a further three years – we asked him whether in these three years the problem was put to him in any manner or from any source. His reply was in the negative. According to him, no one had raised this problematic matter with him. He himself, he said, "did not grasp the conflict which was created by the fact that on the one hand he was permitting an interrogator to deviate from the normal conduct of the interrogation, and on the other hand, was then sending him to court to deny having done so."

This same GSS Chief was aware of the change in 1971, as it worried him, yet from a totally different aspect. He was concerned over the fact that GSS interrogators' Court appearances would take a lot of time a the expense of interrogation hours. The other, far more important aspect – of the interrogators' testimony and the new problematic situation it gave rise to – did not, as we noted above, occur to him at all.

2.29 The sole attenpt to cope with the problem in an institutional and orderly manner is contained in a document presented to the Commission and bearing the date of December 1, 1971. This is a briefing issued by the Head of the Investigation Unit at the time and distributed among unit members. The briefing, so it says, is intended to remind staff who may be called to testify in Court of "some of their duties imposed on them while on the witness stand." Alongside numerous technical directives, we found the following passage:

> "When giving testimony, the witness is to tell the truth as he remembers it, without being influenced by the possible outcome for either the Prosecution or the Defence. For further emphasis: There is no reason for a witness to lie, even if he deems his lie would aid State security."

It is only reasonable to assume that had Investigation Unit personnel followed the above instruction the problem at issue here would not have arisen in the first place. Yet things went differently. The above instruction remained a dead letter unheeded by the interrogators. As we previously said,

the interrogators chose from the very beginning to conceal from the Court the exertion of any physical pressure whatsoever.

2.30 None of the senior GSS personnel who testified before the Commission could point to the specific moment when interrogators started following this line of conduct. Nor could they indicate any order, instruction or document to this effect. The method in question seemed to have been spontaneously generated, and the interrogators were dragged along and slid into it as a matter of course. One top Investigation Unit member defined it as "lore handed down from father to son." In courses, training and meetings emphasis was placed on the need for total compartmentalization, yet when it came to the issue of testimony and its attendant problems, not a word was said. What is more, none of the GSS personnel who appeared before the Commission could recall, or point to, a single case of any interrogator asking, or objecting to or voicing reflections on the subjet.

We asked the senior staff who appeared before the Commission how this method was inculcated in new interrogators who had recently joined the GSS. The new interrogator, we were told, takes a preliminary training course, and is then posted as an aide or intern with a veteran interrogator in interrogation premises. There the new recruit would find false testimony in court an agreed and accepted norm practised by all veteran interrogators. Small wonder, then, that the new interrogator should accept such conduct as self-evident, and follow suit when his time came to appear in Court, without ever having been explicitly instructed on this issue. This, of course, was accompanied by the interrogator's feeling that the procedure is approved and fully backed by the GSS command.

False testimony in court soon became an unchallenged norm which was to be the rule for 16 years.

2.31 The degree to which this norm was ingrained can be gleaned from a document presented to the Commission and bearing the date 6.9.82. It is a memorandum of a discussion held between the GSS Chief and the Head of the Investigation Unit. The discussion mentioned one method of physical pressure applied to persons interrogated which was referred to, and

commented on, in a Court judgment. According to the above-mentioned document, the summation of the internal GSS discussion was as follows:

> "In trials within a trial... we shall deny carrying out... and shall maintain that... in line with the prison/detention centre procedures."

In other words: not only an explicit order to lie in court, but also a guideline as to the nature of the lie to be told. This memorandum was typed out and distributed among GSS unit heads. The guideline itself was perhaps not new. The novelty consisted in the fact that senior GSS personnel considered false testimony so ingrained and self-evident, that they were not even apprenhensive about putting it in writing and distributing it (This was, as we said, in 1982, when the norm was already 11 years old).

2.32 It should be further noted in this connection that senior GSS personnel stressed to us that inside the GSS itself there was scrupulous adherence to telling the truth, and that this was an iron rule. Anyone caught making false reports inside the GSS was severely punished, and some were even dismissed from the GSS, This approach created a sort of "double entry" book-keeping: adherence to the truth inside the GSS on the one hand, and false testimony in Court on the other. This double standard seems not to have bothered anyone for sixteen consecutive years.

The Commission considers this norm of giving false testimony in Court as a grave failure on the part of everyone involved in investigation activities in the GSS.

2.33 The false-testimony norm survived until 1986. Two grave incidents the publication of which created an uproar, one after the another – the No. 300 bus affair and the Nafsu case – swiftly resulted in the exposure of this norm and its discontinuation. The death blow to this norm was administered by the President of the Supreme Court in the judgment on Nafsu's appeal, given on 24.5.87, where he said:

> "In view of this conclusion, it became clear to us from the statements of the learned Counsel representing the State, that in his opinion GSS interrogators have deviated, in terms of the accumulated weight of

their deeds, from proper procedure, and compounded matters by lying in their testimony before the Special Court Martial regarding the appellant's interrogation, when they denied the main allegations of the appellant concerning the interrogation methods.

"There can be no underestimating the gravity of this conclusion, which points to the said witnesses' disavowal of their duty to tell the truth before a judicial tribunal. These deeds constitute far-reaching harm to the credibility of the representatives of the said organ of the State. The Court was thus deprived of the ability to decide in the appellant's case on the basis of true facts, and the status and power of the Court were harmed when it was misled by the interrogators' statements.

"The grave deed which was revealed in this case, and which resulted in the Court basing its findings and conclusions on confessions concerning which incorrect facts were presented to the Court regarding the manner in which they were obtained, requires the taking of decisive measures to eradicate this phenomenon, and we hereby draw the Attorney General's attention to this." (Izzat Nafsu vs. Chief Military Prosecutor, Criminal Appeal 124/87, Part. 6 – not yet published.)

In the light of such sharp comments by the Supreme Court and in view of the public furor generated by this case, it was clear that the method could no longer survive, and it indeed collapsed. On 10 June 1987, about two weeks after the above judgment was given, GSS interrogators met for a study day presided over by the Head of the unit. The written summation of the study day contains the following passage:

"Following the Nafsu case, an express directive has been issued to the effect that the GSS does not permit lying in court."

This single sentence symbolizes the end of a 16-year era, in which interrogators, as a method, customarily gave false testimony in court. All the ranking GSS personnel told us that this directive is being observed in full and

that the custom of giving false testimony in court has been conpletely discontinued. We are certain that indeed this is so.

2.34 We have already said that false testimony in Court was the easy solution adopted by the interrogators as a way out of the dilemma residing in the conflict between the need for total compartmentalization of interrogation methods and the duty to tell the truth in Court. This solution no longer exists today, yet its removal did not do away with the dilemma itself. It is quite true that the conflict between these two needs is no longer as acute as it was, since recourse to physical pressure in interrogation was considerably reduced over the years, and as its use diminished, the need for compartmentalization became correspondingly less pressing. Yet the dilemma still exists, and it is necessary to find a solution for it other than the one hitherto applied. This is what is expected of this Commission.

2.35 Investigation Unit personnel are currently in a state of suspense and confusion. They are awaiting an answer to two questions that are bothering them. One question concerns the fate of those interrogators who followed the illegitimate norm throughout the years and gave false testimony in Court. "Their fate" in two senses: both the criminal implications of these testimonies and the civil implications of damage suits which may be filed against those interrogators. The second question concerns future conduct. Since today it is already clear to all that no one will further tolerate false testimony in Court, the compartmentalization of investigation methods is in concrete danger. Telling the whole truth in Court may expose interrogation methods and hence cause them to be abandoned.

Temporary procedures have been established for the interim period – with the concurrence of the Chief Military Advocate and the Chief Military Prosecutor, and with the Attorney General's knowledge. In brief, the temporary procedure decided upon states that whenever a trial within a trial is expected, the GSS legal advisers will conduct a thorough examination of the case, and report on it to the military Prosecutors. In those cases where the military Prosecution decides not to cause a trial within a trial, an "alternative approach" will be considered. Such approach may consist in the avoidance of the trial within the trial, or in refraining from going to Court at all and

taking administrative measures instead. This, as we said, is an interim arrangement until a new, orderly, institutionalized procedure is established.

2.36 Today, with the method of false testimonies having bankrupted itself, as decribed above, the question of how long it would have lasted were it not for what happened, is academic. Constant and methodical lying cannot go on for long, and as the saying goes, "You can't fool everybody all the time." The survivability shown by the method for 16 years is therefore quite surprising. There is no doubt that for years the method drew encouragement and viability from the Courts' trust in the interrogators who appeared before them as witnesses. From the testimonies we heard it turns out that the percentage of cases in which a confession was rejected due to the Court's disbelief or doubt in the interrogators' statements on the witness stand was very small. In the vast majority of cases the Courts preferred the interrogators' testimonies to the accuseds' allegations concerning the use of illegitimate methods against them.

Yet "riches does not last forever" [Proverbs 27:24]. We heard from some senior GSS members that in recent years cracks had begun to appear in the method, since both the Courts and the military and civil prosecutors began losing their trust in GSS interrogators.

A clear hint to this effect can be found already in the Investigation Unit's Report of 1985, where the unit Head notes that the unit has some across the problem of "a regression in the trust the Courts used to place in our men in the past."

It is therefore reasonable to assume that the method would have come to an end in course of time – whether by slowly dying out, or through the publication of an event such as the Nafsu case. How long would this have taken is anybody's guess, and, as we said, today the question is purely academic.

The Reasons for Giving False Testimony

2.37 The principal reason why GSS interrogators lied in court, during trial within the trial, and denied applying any physical pressure whatsoever on

persons under interrogation, was the operative need not to expose the methods of interrogation. By its nature the GSS is a body which acts, and must act, in secret and far from the public eye. To this end the GSS has imposed virtually total compartmentalization on itself and its staff. If this is so for the GSS in general, it is all the more so for the investigation unit. For a long time, varied and diverse methods of interrogation, the chief effectiveness of which lies in their secrecy, have been employed in this unit. The moment such a method is exposed and revealed, its efficacy is damaged or completely disappears. One method of interrogation is physical pressure, which interrogators regard as an interrogation tool of the utmost importance. It is the view of the unit that without this tool, effective interrogation is inconceivable. Thus, if its details are exposed, its effectiveness will disappear and serious damage will accrue to investigation work in general which has – it bears reiterating – scored many successes, both in thwarting and discovering attacks, and has saved many lives.

Hence, in order to preserve their investigative tool, i.e. absolute compartmentalization, the investigators felt that it must apply to everyone, including even the Courts. The logical continuation was to give false testimony in Court.

2.38 The second reason is directly related to the judicial process itself. We have already said that the GSS, justifiably, views the conviction of a terrorist and his imprisonment for a lengthy period as a most important preventive measure. Accordingly, the judicial process through which the terrorist is removed from the sphere of terrorist activity is one in which the GSS takes a great interest. The success of the GSS in a trial is, therefore, directly dependent on the acceptance of the accused's confession – in the majority of cases the only evidence against him – by the Courts. Revelation of the acts of physical pressure exerted in interrogations puts at risk the admissibility of the confession by the Court. Therefore the GSS concluded, and from its viewpoint this was the most logical conclusion, that the danger of having confessions rejected must be prevented by concealing the means of physical pressure from the Court, even if this entailed perjury.

2.39 The third reason for employing the method, and especially for its

survival for such a lengthy period, has already been mentioned: it simply succeeded. For years the GSS interrogators who testified in Court received the full trust of the judges. Because of this trust, and the success of the method of false testimony, no one ever saw the need to reflect on it or search for other methods which would ensure the conviction of the guilty.

Rationalizations for Committing Perjury

2.40 Although the interrogators, in their view, had good reasons for lying in court, and although this became an accepted and continuous method, they felt very uneasy in this situation, and their conscience troubled them. This is true for at least some of them. In order to be able to continue employing this method while also being at peace with their conscience, over the years they had developed a series of rationalizations for this situation. We have extracted the following from their testimony before us:

Interrogation work for uncovering Hostile Terrorist Activity and its prevention is a sacred mission which justifies the means, any means. We the members of the GSS – as someone said – are the emissaries of the people of Israel to perform actions which the State cannot take upon itself. Here we are talking about "the cleaning of sewers" the existence of which endangers State security, and this unpleasant mission has been imposed upon us. One cannot clean sewers without dirtying oneself. We took risks just as soldiers on the front take risks.

Statements in this spirit we heard from numerous senior GSS personnel. By means of such self-justification, the criminality of perjury becomes an ideological criminality, whose central motto is that security is above the law.

2.41 The GSS personnel declared to us, with a hint of pride, that they had been extremely scrupulous in ensuring that any confession presented to the Court would be a truthful one, whatever the means used in obtaining it. Never, they explained to us, was such a confession brought before the court before it was examined and verified by other intelligence sources, including sources which could not be brought before the Court. Furthermore, there were cases where investigators had full confessions of persons under

interrogation which were not presented in Court, because the interrogators were uncertain about their veracity. Never, one of the investigators testified before us, did I feel that I was putting an innocent person into prison.

We were convinced that this was indeed the aim of interrogations by GSS investigators. We will also emphasize here that in this respect their methods are as far as East is from West, from the notorious methods of the secret police in certain totalitarian states, where pressure is used to extract false confessions from a person under interrogation for something he did not do, in order to liquidate him later, after a staged show-trial, or to send him into exile.

Because the investigators were convinced that what was said in confessions was the truth, its presentation Court was easier for them, even at the cost of perjury.

2.42 The investigators found an additional rationalization for doing what they did in the unqualified backing they received from their superiors. Within the framework of a clear and rigid hierarchy such as that of the GSS, backing "from above" is very meaningful. Naturally, it is much easier for an investigator on the witness stand to commit perjury when he knows that his action is performed not only with the knowledge, but also with the blessing of his superiors.

The investigators also found justification for their actions in the fact that, in many cases persons under interrogation exaggerated greatly in their descriptions of the physical pressure employed against them. A situation thus developed that when interrogators denied in their testimony the use of any physical pressure whatsoever, at least part of their testimony – that which related to physical pressure alleged by suspects, but not actually employed – was true. Under these conditions, it was easier – at least for the conscience – to deny also the physical pressure that had been employed.

Above all else, of course, was the principal rationalization of "no alternative." One of the GSS Chiefs told us frankly that he did not change the norm of committing perjury, and was incapable of changing it, because

"there is no alternative to this situation". Simply, he said, I had no other solution.

Who Knew About the Existence of the Method?

2.43 In the chapter dealing with the justifications that GSS personnel found for themselves for perjuring themselves in court, we already mentioned the interrogators' feeling that their actions not only had the backing of their superiors but that elements outside the GSS also knew about the situation and indicated their assent by their silence. Among the latter were, according to what was claimed before us, the Prosecution – both civil and military – the Courts and the political echelon.

Regarding the Prosecution, the civil and especially the military one, not a single person from the GSS maintained that there was ever any explicit mention, between interrogator and prosecutor, that the testimony which was to be given or which had been given, was false. There was, according to GSS personnel, a kind of tacit, winking agreement that, on the witness stand, the interrogator would deny the use of any physical pressure whatsoever. We heard numerous senior prosecutors, both civil and military, including two former Attorneys General and a Chief Military Advocate. They categorically denied that they knew or even imagined that the interrogators were systematically lying in Court in trials within a trial. One former Attorney General even stated vehemently that any such allegation against the Prosecution, was "not only unjust but base."

2.44 The Commission was convinced that the senior echelon of the Prosecution, both civil and military, not only knew nothing about the interrogators' routine giving of false testimony, but did not even imagine that such a custom existed. They declared before us that they placed full confidence in the GSS until the revelation of the No. 300 Bus and Nafsu cases shook this confidence. We are convinced that this was indeed so. As for the level of the prosecutors in the field, i.e. those who actually represented the Prosecution in Court, we heard no testimony which could confirm the allegation that they knew or understood that the interrogators

were not telling the truth in trials within a trial regarding the circumstances of obtaining confessions from persons under interrogation.

2.45 As was stated, some GSS personnel felt that the judges were also "part of the game". We heard this explicitly from one interrogator and implicitly from another. We shall not dwell on this matter at any length. Even though no judges were called to appear before us and we heard no explicit denial, we find this allegation to be baseless, and wholly unacceptable. We can only regret that the allegation was made in the first place by a few GSS personnel.

2.46 On of the senior members of the Investigation Unit, who was involved in both the No. 300 bus affair and the Nafsu case, claimed before us in his testimony that the heads of the GSS told the investigators that the method of giving perjured testimony in Court was known by and concurred in by the political echelon. In this instance, the "political echelon" means principally the Prime Ministers who for years have been holding frequent meetings with GSS chiefs and receiving current reports. We heard testimony from three Prime Ministers who served in the period of time under discussion, including the present Prime Minister. All of them denied any knowledge of this and stated that this was inconceivable. No properly-run State, they said, can permit itself such things. None of the GSS Chiefs claimed before us that the matter had ever arisen in their talks with the Prime Ministers. We are convinced that this issue was in fact never brought to the knowledge of the Prime Ministers: nor did we find a hint of this in the records kept of those talks.

The Nafsu and No. 300 Bus Cases

2.47 We have already mentioned these two cases (in Sections 1.6–1.7; 2.1–2.8). We shall refer to them briefly again in the context of the false-testimony issue which is being discussed here.

Chronologically, the Nafsu case, as is well known, preceded the bus affair by several years (the public was apprised of the cases in the reverse order). In terms of the issue we are considering, there was nothing in this case which

differed from the method which was customary in the GSS throughout the years. Physical pressure was employed against the Accused during his interrogation, and on the witness stand in the military trial his interrogators denied this, and denied his contentions on this matter in the trial within the trial. The Court Martial preferred the interrogators' testimony on this matter to the testimony of Nafsu and admitted his confessions. All this occured in accordance with the format that was in practice throughout the years, as we described above. The fact that the subject of this case was not an ordinary terrorist but an IDF officer, is immaterial here. What is unique about this case is that years later the Chief Military Advocate admitted in the Supreme Court that the testimonies of the interrogators in the trial within the trial of this case were untruthful. It was his stand on this matter and what the Supreme Court said in regard to it, that finally led to the appointment of this Commission. They also led to the GSS today realizing that this was a wrong and unacceptable norm, and to its discontinuing this practice completely.

The second case, known as the No. 300 bus affair, is quite different from the practice of giving false testimony in trials within a trial. Different – and in our eyes far more serious. Here, in addition to perjured testimony, there was an activity of conscious and deliberate obstruction of an investigation by a committee appointed for this purpose, through a GSS member who was appointed a member of this Committee. Suffice it to say, that it is likely that something as serious as this could never have taken place, or even have occurred to anyone, except against the background of the year-long practice of giving perjured testimony in Courts, which succeded in misleading the Courts in so many cases.

Who Bears Responsibility

2.48 We have already discussed the inception of the system of giving false testimony in Court. The conclusion to be drawn is that it was not the GSS Chiefs who introduced this norm. On the other hand, we have no doubt that they bear the principal responsibility for the fact that this norm persisted for years. Three GSS Heads testified before us, whose terms of office, for our purposes, covered a 16-year period. The first of these had already been at the

head of the GSS for several years when, in 1971, the norm we are dealing with was introduced. He served in his position for three more years, until 1974. He told us, and we have no reason to disbelieve him, that during the three years of his service when the custom of giving perjured testimony already prevailed – although perhaps not in large numbers – he was not at all aware of the problematic situation it entailed, and did not grasp the conflict caused when an interrogator was permitted to deviate from regularity in interrogation procedures and then sent to Court to deny this in his testimony. In the view of this Commission, "I didn't know" and "I didn't think about it" cannot absolve the GSS Chief of responsibility for events – as he himself also stated. By 1971 this GSS Chief had already held the position for about seven years, and he was well-acquainted with all the problems of the GSS. The fact that henceforth interrogators were required to appear in court was also quite clear to him, and he even expressed concern about the many work-hours which would go to waste in this way. Objectively, he did have the document of 1.12.81 to base himself on, in which the interrogators were directed to testify truthfully in Court. But if he had given thought to the custom of giving false testimony which actually began to take root in the period of his service, it still could have been nipped in the bud. All he had to do was see to the implementation of the procedure set out in this directive. He did not do this, and in 1974, when he retired and vacated his position for his successor, the wrong method which began during his period of service was already well entrenched as an accpected system and norm.

2.49 The GSS Chief who succeeded him, a qualified lawyer, held the position for some six years, until 1980. Unlike his predecessor, he was aware and conscious of the method, and of the problem it aroused. He did nothing to change it and frankly admitted to us that he "escaped" from the problem and "repressed" it. According to him, he did not change the norm and was incapable of changing it because "there was no alternative to this situation. I had no other solution."

On 11 June 1976, the GSS Chief appeared before the unit's investigators and spoke about the subject of wielding physical pressure. His comments were later transcribed and distributed in a circular which was submitted to us. This circular contains a passage on this subject which amounts to a contradiction

in terms. In his testimony before us, that former GSS Chief agreed that the wording was indeed "not the clearest wording," and that on its face it contained an internal contradiction. At all events, he explained, clearly the intention was to say that the use of physical pressure was to be denied in Court, too, but not before the interrogator had been briefed.

In any case, the fact which is not at all denied, is that throughout the six years of his service, the method he inherited from his predecessor continued. He was aware of it, and not only did he do nothing to change it, but even supported it and gave it more strength, because according to him, no other alternative existed.

The Commission sees this GSS Chief as one of those responsible for the fact that the norm of giving perjured testimony in Court went on for years without interference and without anyone saying anything about it.

2.50 In 1980 a new GSS Chief took over, who also served for six years, until near the end of 1986. His approach to the problem was totally different from that of his predecessor. When he was appointed, he found an established, long-standing norm. This was known to all, he told us, and passed "from generation to generation." While his predecessor had been aware of the problem, felt uncomfortable because of it and therefore repressed it, the new GSS Chief by now did not even feel that any sort of problem existed. As far as he was concerned, the giving of perjured testimony was a legacy from previous generations, not to be questioned. When I think of the war against terrorists, he told us, I don't think in the context of the Israeli Court. What is important to me is that the guilty terrorist be punished. During his testimony we asked him whether he too, like his predecessor, had repressed the problem. His reply was revealing: it is not a matter of repression, he said, "You repress something of which you are conscious. For me, this topic was not even on the agenda."

Thus it is not surprising that it was during this GSS Chief's term of office that, for the first time, an explicit order to lie in trials within a trial was put into writing and distributed, including instruction as to the kind of lie to be told in testimony (see above, Sec. 2.31).

Here was a GSS Chief who inherited from his predecessors a fixed and established norm of giving perjured testimony in Court, took it for granted, and did not even grasp that there wase anything wrong with it. Obviously, then, not only did he not try to do anything against it: He actually reinforced it and did not even flinch from giving it written authorization.

The Commission also sees him as one of those responsible for the existence of the wrong method being discussed here, and for the fact that it endured until it was shattered with a loud blast.

2.51 The Commission attributes responsibility of a slightly different, albeit no less serious nature, to the stand and attitude of the GSS Legal Advisers. These were jurists for whom telling the truth in Court must be a supreme value. Nonetheless, they served in their positions for many years with clear knowledge of the method of lying in court employed by interrogators, and did not react. They had not a single letter, document or note to show us, expressing opposition, protest or concern about this situation. One of them, the GSS Legal Adviser for quite a few years, could say only that all those who employ the method and all those who assent to it "live with a heavy heart". It is quite ironic that this Legal Adviser wrote a hefty tome called "Legal Aspects in the Work of the GSS," including a long and detailed chapter about "Israel as a Law-Abiding State." It is a pity that he did not study what he himself wrote. He concluded his long and embarrassing testimony before us by declaring that he thought he was serving the important interests of the state of Israel by ignoring the lying. Another legal adviser admitted that he knew about the lies being told in Court and reconciled himself to them because "we operated within a framework of security constraints." He consoled himself with the fact that they knew that, in any case, the confession submitted to the Court was a truthful one. A third Legal Adviser, who said more or less the same, replied to a question he was asked, by saying that if an interrogator had told him that he employed physical pressure on a suspect, he would have instructed him to conceal this in his testimony in court. In other words, he would have instructed him to lie in his testimony. These words, when uttered by a jurist and a legal adviser, make one shudder.

The Commission is of the opinion that the GSS Legal Advisers, who were aware of the method being practiced, should have warned, cautioned, and cried out to heaven and earth. Because they did not do so, and acquiesced in the situation, they came to share in the responsibility to no less a degree than the GSS Chiefs.

2.52 Thus far we have considered the responsibility of the GSS Chiefs and of the GSS Legal Advisers for the entrenchment of the "norm" of perjury practiced by GSS interrogators. We have based ourselves solely on what was said by the persons in question themselves. From the legal point of view, this was prima facie responsibility of accomplices to an offence, i.e., instigators, under Sec. 26(3) of the Penal Code, or of a person who knowingly did not take reasonable measures to prevent the execution of a criminal act by another (Sec. 262). We consider that this applies to the second and third of the GSS Chiefs referred to above, who knowingly acted or refrained from acting. We cannot say that this is applicable to the first GSS Chief since we determined that he did not know that GSS interrogators were giving false evidence in court. This, however, does not detract from his command responsibility for that which first occurred during his term of office as Chief of the GSS.

However, the responsibility does not devolve upon them only: the persons in charge of the interrogator at all other levels, starting with the Heads of the Investigations Unit with whose explicit or implicit approval the interrogator went to Court and testified as he did, are also prima facie considered to be instigators to an offence, under Sec. 26(3) of the Code, and the interrogator himself who gave false testimony is responsible as "a first-degree offender," under Sec. 26(1). None of these persons can have recourse to the defence of justification (obeying the order of a competent authority), under Sec. 24(a)(2), since the act they committed was manifestly unlawful.

Conclusion

2.53 The picture which emerges from the above is a dismal and regrettable one: The GSS which has done and is doing work of the utmost importance in

preserving Israel's security and has to its credit many outstanding achievements in this area, failed utterly, in permitting itself to violate the law systematically and for such a long period by assenting to, approving, and even encouraging the giving of false testimony in Court. The GSS top echelon failed by not comprehending that no activity in the field of security, however important and vital it may be, can place those acting above the law. It did not understand that it was entrusted with a vital task, which perhaps justifies means, but not all means, and certainly not the means of giving false testimony.

The Commission notes with satisfaction that this harmful practice has now been totally abolished.

Preservation of Records

2.54 The subject of preserving the records of an investigation assumed importance only in recent years. During all the previous years investigators had acted on the principle that the Service does not carry out its investigations in order to collect evidence proper for presentation in criminal trials, but only for its own security and intelligence purposes. Therefore investigators of the Service did not keep daily records of their investigations. During an interrogation the investigator would not take down in writing anything said by the person interrogated, but only what seemed to him to be worthy of recording. At the conclusion of the interrogation the investigator would draw up a "Summary Report" containing the essence of the information provided by the person interrogated and further data which the investigator considered to be relevant. This summary would be forwarded to the Civil or Military Police. After that Report had thus been forwarded, the entire material of the preceding investigation would be destroyed as a matter of routine.

2.55 At the end of 1980, when the Nafsu case already began to be heard by the Special Court Martial, Counsel for the Accused applied to the Supreme Court for a stay of the criminal proceedings agains Nafsu, on the ground that the material of the investigation which had been collected by the investigators and which could have been of use for the Applicant's Defence had been destroyed, while the material put at the disposal of the Defence was only "selective." The Court accepted the principle acted on by the Service that investigation by the Service is not a criminal investigation as described in the Criminal Procedure Law. The difference between the two – so the Court held – is that a criminal investigation is conducted according to fixed rules which the investigator is unable to change, while the conduct of an investigation by the Service "is largely at the discretion of the investigator himself or his superiors," the reason being – so the Court adds – "that such investigations are not conducted in order to prepare evidential material for the Court. The manner of the conduct of such an investigation is not a matter with which the Court is concerned: As long as the means of investigation do not contravene the law, the Court will not enquire wheter the means of investigation are good or efficient or reasonable, or not." The investigators

of the Service, so the judgment states, have regard only to the requirements of security intelligence, they collect what they consider to be necessary for those requirements and destroy what they consider not to be necessary. The only reservation which the Court saw proper to make is for a case where evidential material has been destroyed in order to conceal it from the Court, because then its destruction becomes illegal. But – so the Court states – in the present case that was not so: Here the destruction of the material was a matter of routine, and therefore there was no ground for complaint against the Service which receives much secret intelligence material "which it is proper, for reasons of security, to destroy after it has been used". Accordingly the application was refused, as already mentioned.

The Service was, of course, content with this judicial pronouncement which constituted approval and confirmation of a practice which been acted on for years. The judgment did not require any change in existing practices, and those continued as before.

2.56 But not for long: On 3.8.83 the Supreme Court gave a Judgment which henceforth caused a substantial change in the methods of preserving records. That was Criminal Appeal 343/82, Abu Sneina v. the State of Israel (not reported). In the last part of its judgment the Supreme Court addressed itself to the question of the preservation of records. Because of its importance for our own subject we shall quote it in full:

> "As a marginal observation to our judgment, but not as a matter of marginal importance, I see fit to refer to a matter that became apparent in the course of the proceedings in the Court below and which concerns the means of investigation by the GSS. As appears from the evidence of a member of the GSS called 'Sami,' investigators of the GSS do not keep records of interrogations of suspects conducted by them (File A, pp. 26–27 of the Minutes); more than that, they do not always preserve documents written by the suspect in the course of his interrogation, but part of them are destroyed. The exercise of the discretion whether documents are to be preserved or thrown away is, according to this witness, entirely arbitrary, and by way of such "discretion" only part of what the suspect has written is forwarded by

them to the Prosecution (File A, p. 34 of the Minutes). This method is wrong and must no longer be followed. When the investigation by the GSS and that by the Police are bound up with each other, with the Police investigation actually being the integral continuation of the GSS investigation, there is no justification for this existing practice, and all that has been said by this Court more than once about the duty of recording placed on Police investigators and the grounds given for it applies also to this matter (see, inter alia, Cr. App. 476/79, 35(1) Piskei Din 788, 798–799, 810). All the more so, there is no justification for destroying documents which represent all that happened during the investigation and enable the Court to arrive at its judgment with full knowledge of the real facts.'' (This passage was written by Justice A. Goldberg, wit President Shamgar and Justice Netanyahu concurring).

2.57. This dictum constitutes a substantial change from the attitude that the Supreme Court adopted in the Nafsu case, as cited above. The new attitude of the Court required, of course, a response, which was not late in coming: Already on 5 September, 1983, a month or so after the judgment was given, the then Attorney General wrote a letter to the Legal Adviser of the Service, citing the above passage from the judgment, and concluding as follows: ''I request that you state your position regarding this passage.'' The Legal Adviser replied in a detailed letter of 13 September 1983, in which he again described the practice which had been accepted all those years and the reasons for it. Naturally the letter quotes extensively from the opinion of Justice H. Cohn in the Nafsu case which, as mentioned above, supported the position of the Service on the subject. Yet, it was clear to the Service that the judgment in the Abu Sneina case created a new situation which required a response. The Legal Adviser to the Service concluded his letter as follows:

> ''The judgment in the Abu Sneina case creates many difficulties for the General Security Service and of necessity changes the form and the method of its work. But of course we shall obey the directives of the Court and have also begun at once to prepare ourselves accordingly''.

As a first measure the Head of the Investigators' Unit issued already on 9

November 1983 a general instruction that "follow-up cards for dealing with persons interrogated will be distributed and such card will have to be filled in for each person interrogated." That was an interim and temporary step, until the procedure would be clarified and laid down with the cooperation of representatives of the Attorney General.

2.58 The Attorney General caused the procedure for recording investigations by the Service to be formulated, and at the beginning of the year 1984 such rules were issued. Particulars of them we include in the Second Part of this Report and there we also describe their operation in practice and recommend that this subject be reconsidered.

Control and Supervision

2.59 As regards Control and Supervision over the methods of investigation by the Service in matters of HTA, there exists internal control within the Service. We have already stated above (in Para 2.32) that disciplice within the ranks of the Services is strict. Every deviation from internal instructions regarding the conduct of HTA investigations is visited by sharp disciplinary action, up to dismissal of a delinquent investigator from the Service.

Control is at present being exercised in two ways:

(a) Internal control within the Investigators' Unit: We were apprised of a set of regulations which are in the course of preparation and which define the duties of that Unit's Senior Staff as including control over the performance of investigations in the Arab sector, such as ensuring observance of legal aspects and procedures and examining conditions of performance.

(b) Investigation of complaints against the behaviour of investigators by a Comptroller of the Service who was appointed lately, in February 1987. The Comptroller operates as a Staff Officer of the Service. He is being assisted by a group of Examiners and at present fulfils those functions which in the past were carried out by Special Investigators who were appointed for each case by the Chief of the Service, to investigate a complaint or a specific unusual occurence. Each complaint by a person interrogated himself or on his behalf

or by his lawyer or by an organization, such as the Israeli Society for Civil Rights, the International Red Cross or Amnesty, which is brought to the attention of the Service by the Courts or other legal authorities or by military or civil Governmental authorities, about improper treatment of a person interrogated, is now being examined on behalf of the Comptroller. For this purpose an oral statement is also taken from the Complainant (in the instructions to the Service investigator it is started that the investigator should question the complainant, unless there exists a reason for not doing so, which has to be recorded. We think that the only reason which could prevent the examination of the complainant is that it is no longer possible to locate him, e.g. when he has been released at the conclusion of the investigation).

If the complaint is thought to be well-founded, a disciplinary sanction is applied against the delinquent investigator. In an appropriate case the investigator may also be charged before the Special Disciplinary Tribunal.

Investigation Premises

2.60 The investigators operate in special investigation premises. The administrative and medical responsibility for such premises and for guarding them rests with the Authorities within the precincts of which the premises are situated. The structure of the premises, their renovation and their rebuilding are within the province of responsibility of the Service and of its budget, in cooperation with the above-mentioned authorities.

The impressions gained from our visits to some of the premises and from a description of the state of others, about which we heard in evidence, are as follows: Part of the premises underwent renovation and are in a more or less normal state, both for persons under investigation and for the investigators. Another part is now undergoing renovation and their condition will improve. Part of the premises is still in a very poor state – dark cells without sufficient lighting and ventilation. Conditions for the investigators are also not satisfactory in those premises and they thus impede both investigators and their investigations. Moreover, prisons are full to capacity and therefore it

becomes impossible to transfer persons interrogated to the general wing of the prison immediately on the conclusion of their interrogation. In the meantime those detainees do not enjoy the privileges (visits by relatives, canteen, etc.) granted to prisoners in the general wing. Overcrowding is intolerable and aggravates conditions which are already bad. This situation also prevents the arrest of new suspects against whom information has accumulated.

Medical Attention

2.61 Medical attention for persons under investigation by the Service is the responsibility of the Prison Service and the Israel Police respectively, depending on the location of the premises. Medical attention is given according to the Standing Orders of those authorities. As a rule persons under investigation in the premises of the Service receive the medical and sanitary service usual in prisons.

Each new detainee is examined at the time of his arrest by a medical orderly, and within about 48 hours, and sometimes within 72 hours, by a Doctor, also when the detainee is already inside the premises of the Service. In such a case the examination is performed within those premises, in unsatisfactory conditions. Each person investigated who has been transferred from the investigation premises to the general wing of the prison undergoes medical examination, and also on being transferred from one prison to another place. The object of these examinations is to ascertain that the detainee does not arrive at the investigation premises in an injured condition and that he is not returned from them after having been harmed during the interrogation.

Special attention is given to persons under investigation who suffer from chronic health problems which require treatment and special medication or which require limitations in their investigation.

Whenever a person under investigation asks for a medical examination, such examination is performed within the investigation premises, by a medical orderly or a Doctor. A medical orderly makes a daily round also amongst detainees in the premises of the Service.

As far as we found, such examinations are carried out meticulously and no medical examination is prevented. Preventing a medical examination is not part of the means of pressure applied in investigations.

The Prisons Service permits Arab Dorctors who have passed a security check to examine detainees and prisoners. That does not apply to persons under investigation who are being kept in premises of the Security Service.

In general, the extent of the Medical Service is not sufficient. The number of Doctors in the Prison Service does not allow for even one Doctor for each prison, and thus consultation by telephone between the medical orderly on duty and a Doctor becomes necessary. The number of medical orderlies is also not sufficient for the efficient performance of all their duties, both as regards sanitation and medical attention.

Chapter Three: Legal and Moral Aspects

Definitions of Hostile Terrorist Activity Offenses

3.1 A "terrorist organization" is defined in section 91 of the Penal Code, 1977, as "an organization, the aim or activities of which are intended to destroy the State or harm the security of the State or the security of its residents or Jews in other countries." Offences of Hostile Terrorist Activities (HTA) are defined in Regulations 57–67, 84–85 of the Defence (Emergency) Regulations, 1945 and in the corresponding sections of Chapter 3 of the Order Concerning Security Provisions (No. 378)[2] and in the Prevention of Terrorism Ordinance, 1948.

The Order Regarding Prohibition of Incitement and Hostile Propaganda (West Bank Region) (No. 101), 1967[3], and a corresponding order for the Gaza District, apply to acts of political subversion which do not reach the stage of actual terrorist acts.

Constitutional Status of the General Security Service

3.2 The status, tasks and powers of the GSS are not actually anchored in statutory legislation specifically devoted to this subject. This is not to say that the GSS exists and operates outside the framework of the law of the land: its legal basis lies in the general residual power of the Government, as the executive branch, to perform, on behalf of the State, any function, subject to any law, the performance of which is not imposed by law on another public body: Sec. 29 of the Basic Law: The Government. Furthermore, various laws (Law for the Protection of Privacy, 1981, Sec. 19(c)(3); Law on Wiretapping, 1979, Sec. 5) mention the GSS as an existing legal fact, as being a body accorded certain powers. The duties of the GSS, as described in Part Two of this Report, and among them the duty of fighting Arab terrorism (HTA) within the territory controlled by the State of Israel, are subsumed under Sec. 29 of the said Basic Law. Sec. 31(a) of that Basic Law allows for

2 The Legislation in Judea and Samaria (in Hebrew), new updated edition, edited By Tzvi Preisler, Advocate (hereafter: Preisler), p. 5.

3 Preisler, p. 146.

the delegation of Governmental authority to one of the Ministers. Since the GSS was made subordinate to the Prime Minister in 1963, a constitutional custom prevails according to which the Prime Minister bears direct responsibility for GSS activities, within the framework of the joint responsibility of the entire Government before the Knesset, under Sec. 4 of the said Basic Law. Regarding the Administered Terrotories (Judea, Samaria and the Gaza District), governmental powers are vested, of course, in the military commander. He issued an Order Concerning GSS Personnel Operating in the West Bank Region (No. 121), 1967[4] (and a corresponding order for the Gaza District), according to which the GSS personnel were vested with the powers given to soldiers, and a 1972 amendment to this order in 1972 states that a GSS man's superiors shall be "an authority which it is obligatory to obey." In practice the activity of the GSS in the territories is coordinated with the Territorial Commands of the IDF, the headquarters in Judea and Samaria and the Gaza District, with the heads of the Civil Administration, and with the Coordinator of Activities in the Territories, and at the political level the coordination must take place between the Defence Minister, who is responsible for the Military Government in the territories, and the Prime Minister, who is responsible for the GSS.

Investigative Powers of GSS Investigators on HTA Matters

3.3 As is explained in the chapter on the structure of the GSS, the GSS contains a unit whose task it is to carry out interrogations relating to HTA. Only some of this unit's personnel have been designated investigators by the Minister of Justice, on the model of appointments of police investigators, according to Sec. 2(1) of the Criminal Procedure (Evidence) Ordinance. We accept the GSS interpretation that the purpose of this arrangement is to determine the obligation of a person under interrogation to reply truthfully to the questions of such an authorized investigator, as stated in Sec. 2(2) of the Ordinance; however, from this it is not to be inferred that this is the only means available to authorize a policeman or other public official (such as GSS investigators) to carry out interrogations within the ambit of his duties.

4 Preisler, p. 371.

This was decided by the Supreme Court as far back as the Mandate period.[5] The source of this power currently resides in Sec. 17 of the Law of Interpretation, 1981, which vests a holder of substantive authority with the power to determine also his own work procedure, and in general the auxiliary powers required for the fulfilment of his functions. The investigator must exercise these powers subject to the limitations prescribed by law.

Limitations According to Law

3.4 Legal limitations on methods of investigation may derive from criminal, civil or administrative law (including internal administrative orders binding on the investigator).

Limitations According to Criminal Law

Sec. 277 of the Penal Code, 1977, states that a public servant commits a criminal offence when he uses or directs the use of force or violence against a person for the purpose of extorting from him a confession to an offence or information relating to an offence. Also relevant are sec. 428, on blackmail by means of threats, sec. 415, on obtaining anything by deceit, sec. 416, on obtaining anything by means of a stratagem, and the sections on assault (sec. 378 et seq.).

Limitations According to Civil Law

Harm inflicted physically on a suspect, or on his wellbeing, can amount to the tort of assault, under secs. 23 and 25 of the Civil Wrongs Ordinance (New Version).

Limitations According to Administrative Law

A GSS investigator, like any other public servant, must maintain the obligations imposed by law on administrative acts, such as the obligation not

5 Cr. A. 100/46 (1946) 2 ALR 674,676, and see also Cr.A. 155/52, 7 Piskei Din 421.

to exceed the authority vested in him under the law and to wield his authority in good faith, and not for goals which are foreign to the purposes for which he was vested with his authority. In addition, the investigator must fulfil special administrative directives which have been laid down by law for the fulfilment of his tasks. In this context, we must make special reference to the "Judges' Rules."

3.5 The Judges' Rules were received into Israeli law from English law, by way of Supreme Court rulings. They are not today, and never were in the past, in the nature of binding law the violation of which leads to unequivocal legal sanctions. This bears emphasizing, because GSS investigators of various ranks who testified before us were apparently briefed to the effect that anyone who violates the Judges' Rules by so much as one iota necessarily incriminates himself, and that a confession by a suspect obtained without strict observance of the Judges' Rules must necessarily be ipso facto rejected; and since it is impossible to conduct an effective interrogation while completely observing the Judges' Rules, no choice remains but to violate them; hence the conclusion that a GSS interrogation must necessarily be conducted outside the framework of the law. However, this is not so: the underlying assumption of this approach is wholly misconceived.

The Judges' Rules originated in England in 1912, following an appeal by a Chief Constable to the Judges of the High Court there, that police personnel be guided how to conduct an interrogation of suspects, since contradictions had emerged in judges' comments on the obligation of the police to caution a suspect (see the report of the Royal Commission on Criminal Procedure, 1981,[6] p. 153). The judges acceded to this request and formulated regulations to guide the police – an exceptional case of judicial legislation outside the framework of a formal judgment.

In 1964, a new and amended version of the Judges' Rules was issued. There is no point here in going into detail. Suffice it to say that they indeed ensure the suspect's right to remain silent, about which the interrogator must inform the suspect as part of the caution administered to him. However, they also

[6] Cmnd 8091 – 2.

provide wide scope for the interrogation of a suspect, as long as the interrogator has not decided to charge him with committing an offense.

Judicial decisions in England are to the effect that a confession not obtained in accordance with the Judges' Rules is nevertheless admissible as evidence in a trial.[7]

Our Supreme Court adopted the Judges' Rules, according to their English format, and therefore ruled along the same lines.[8] The Supreme Court has occasionally observed that the Police would do well to act in accordance with the Judges' Rules, but things have never reached the stage where a confession was thrown out because of a violation of the Rules. Instead, emphasis has always been placed on the condition that the confession must be given "of free will" (see Par. 3.18, below).

Concerning the suspect's right to remain silent, it bears mentioning that in various laws Israeli legislation has sanctioned directives which oblige a suspect to reply to an interrogator's questions. Therefore, the right to remain silent is not to be viewed as an inviolable principle.[9].

3.6 Like any other administrative authority, GSS senior officials may lay down directives to be observed by an investigator of HTA, the violation of which can constitute grounds for imposing disciplinary sanctions against him under the Civil Service Law (Discipline), 1963, whether by his superior or by means of instituting disciplinary proceedings. For this purpose, regulations were made in 1979 for the establishment of a special disciplinary tribunal for GSS personnel and personnel of the Institution for Intelligence and Special Assignments [the Mossad].[10] This tribunal, with its special composition, was in fact set up.

7 R.v.May (1952) 36 Cr. App. R. 91,93; R.v.Best (1909) 1 KB 692.

8 See the leading Judgments in Cr.A. 20-21/49 (Ali Abdul Hadi & Muflih Za'arur, 3 Piskei Din, 13, 33 and in Cr.A. 307/60, Hussein Yassin, 17 Piskei Din 1541, 1566.

9 See Income Tax Ordinance (New Version), sec. 138; Customs Ordinance, sec. 2; Added Value Tax Law, 1975 sec. 108; Currency Control Law, 1978, sec. 14.

10 See K.T. 1978/9, p. 750; K.T. 1979/80, p. 36.

Pleas in the Investigator's Defence

3.7 We return now to the topic of the limitations placed on a GSS investigator by criminal and civil law, and will set out the pleas an investigator can put forward in his defence against a criminal charge for an act or omission that he committed during an interrogation, or in a tort suit resulting therefrom.

Sec. 24(1)(a) of the Penal Code exempts from responsibility an accused who acted in obedience to an order given by a compentent authority, provided that the order was not manifestly illegal. This term was interpreted in the Kfar Kassem case,[11] in which, as will be recalled, the Military Appeals Court affirmed Judge Halevy's striking simile at first instance that "manifestly illegal" means that any person of conscience will see a black flag saying "prohibited" flying over such an order.

3.8 In our opinion, great importance attaches to the defence of "necessity" in Sec. 22 of the Penal Code, where a GSS investigator's criminal responsibility is concerned. The significance of this defence in the special context of activities designed to foil terrorist acts has not yet been considered in an Israeli court ruling. In other judicial systems, in the common law world and outside it, we found a discussion of it in legal literature, but there, too, the Courts have not yet expressed their opinion on it in this context, as far as we know. This statutory provision has to be filled with interpretative content, in order to offer a response to new problems that arise in novel situations, even though the legislator may not have envisaged these problems when formulating the statutory provision.[12] In Israel, two learned authors have devoted a full discussion to the defence of necessity in general: Prof. A. Enker, in his book on Necessity and Compulsion in Penal Law (Bar-Ilan University, 1973), and Prof. S.Z. Feller, first in his article on "Necessity Stricto Sensu as a Situation Negating the Criminality of an Act,"[13] and more recently in his comprehensive book on the Foundations of Criminal Law (Jerusalem, 1987), Vol. 2, p. 487 ff.

[11] Cr.A. 279-283/50 – Ofer v. Chief Military Prosecutor, 44 Pesakim 362.
[12] And see C.A. 150/50, Kaufmann v. Margines, 6 Piskei Din 1005, 1034.
[13] 4 "Mishpatim" Journal (in Hebrew), p. 5.

3.9 Sec. 22 of the Penal Code was copied from Sec. 18 of the Criminal Law Ordinance of 1936, without any substantive change. The Mandatory legislator imported it through the Cyprus Penal Code, from the Criminal Law Digest compiled by Justice Stephen. This historical development is reviewed by Prof. Enker in his book (p. 98). Stephen explains his approach to this subject in his book, "The History of English Law," Vol. 2, p. 108 ff. It is noteworthy that English jurists are divided over the very existence of a general defence based on necessity: See discussion of this in Glanville Williams' "Textbook of Criminal Law," 2nd ed., p. 597 ff. The oscillations apparent in the conclusions of various Commissions that wrestled with this problem there, one after the other, testifies to this. In 1974, a team of jurists affiliated with the Law Commission wrote an opinion favouring the introduction of such a general defence into statutory law "provided that it can be formulated in a manner that will preclude its applicability in exceptional and inappropriate cases." This reservation reflects the apprehensions that such a general defence could easily become a "disguise for anarchy," as stated by Edmund Davis L.J. in his judgment in Southwark London Borough Council v. Williams (1971) 2 All E.R. 175, 186. However, in 1974 the plenum of the Commission rejected this recommendation, in its Report on "Defences of General Applicability,"[14] para. 4.33. To date, the last word on this subject was said in a further report, submitted to the Commission in 1985.[15] In par. 13.26 of this report, p. 120, it was proposed to leave the entire question for decision within the framework of the common law, or in other words for the decision of the Courts. Nevertheless, included in the draft Criminal Code proposed there (p. 195) is the defence of neccesity for "one who performs an act which he believes is immediately necessary, in order to prevent death or serious injury to himself or others, when the danger he believes exists is of such a nature that it would have been impossible to demand of him to act otherwise."

3.10 In U.S. law, the dominant view is that a general defense of necessity should be allowed, because "such a reservation, like the requirements of criminal intention, is essential for the logic and justice of all criminal

[14] Law Com. No. 83.
[15] Law Com. No. 143.

prohibitions," and that the defense of necessity is designed to prevent a greater evil than that which the law which defines the offense seeks to prevent: Model Penal Code, Sec. 3.02, and see p. 10: "The formulation makes the actor's belief in the necessity sufficient (assuming a valid choice between evils)... Questions of immediacy... have bearing, of course, on the genuineness of a belief in necessity..." See also the discussion of this flexible test for choosing the lesser evil in Perkins and Boyce, "Criminal Law," 3rd ed., p. 1071.

3.11 As far as we are concerned, the determining factor is, of course, the statutory provision in Sec. 22 of the Penal Code (and its parallel in the territories, in Sec. 11 of the Order on the Rules of Responsibility for an Offence),[16] which reads:

> "A person may be exempted from criminal responsibility for an act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honour or property or on the person or honour of others whom he was bound to protect or on property placed in his charge: Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided."

Prof. Feller (in his aforementioned article and on p. 387 of Vol. 2 of his book) comments that in this section two theoretically different legal defences were intermingled, i.e., protection of others (in Prof. Feller's terminology "necessity stricto sensu") and self-defence. Of interest to us here is the protection of others, which the section exempts from criminal responsibility, provided three cumulative conditions have been fulfilled:

1. That the accused acted in order to prevent grievous harm to his person or honour or to the person of others whom he was bound to protect or to property placed in his charge.

2. That this harm could not otherwise have been avoided.

[16] Preisler, p. 144.

3. That he did no more than was reasonably necessary for that purpose and that the harm caused thereby was not disproportionate in the circumstances of the case.

The section accords the perpetrator of the act full exemption from criminal responsibility, and does not confine itself to formal conviction with mitigation of punishment. It reflects the clash of opposing values: on the one hand, values protected by means of the prohibitions of criminal law, and on the other hand the duty, grounded in ethical precepts, to protect one's life or bodily integrity or that of others. Like the defence of obedience to orders, according to Sec. 24(1)(a), the law confronts this dilemma of: "the impossibility of reaching an absolute reconciliation between these two values purely by means of formal law, and thus it foregoes the attempt to solve the problem only by these means, and breaches, as it were, the barrier of judicial categories, and appeals to the sense of legality innate in the conscience of every human being...", as was stated in the appeal in the Kfar Kassem case, ibid, p. 410. In other words, the law itself deviates under these circumstances from the framework of the criminal prohibitions laid down by law, for the sake of preserving a human value which is of higher importance than implementing these prohibitions.

3.12 We shall now consider the above-mentioned three conditions for the defence of necessity, as they are reflected in the interrogation of a suspect by a GSS investigator, during which the investigator performs an act or makes an omission, such as an injury to the person or wellbeing of the suspect, or a threat to him, which contain elements of a criminal offense from among the offences cited above (in Par. 3.4). But before this, we should discuss a fourth condition, which is not stated in Sec. 22, but which learned authors, and among them Prof. Feller,[17] suggest in order to qualify the defense of necessity: that the harm which the defendant acted to prevent must be imminent harm. Similarly, it was also stated in an opinion which the Military Advocate General wrote in 1986 concerning the interpretation of Sec. 22, that the section will apply only if obtaining immediate information from the suspect is vital for preventing injury to human life, and as an illustration he

[17] In his book, Vol. 2, pp. 389, 400.

mentions the case of a bomb which has just been planted in a crowded supermarket, and which is about to explode at any moment.

It bears noting here that the requirement of imminence of the danger is sometimes intermixed by authors with the requirement of immediately obtaining imformation from the suspect.

According to this version, then, the defence of necessity is not applicable except when, because of the time factor, the danger is liable to be realized immediately, and THEREFORE it is essential to get the information immediately from the suspect. This is not our opinion. The section itself makes no mention of such a qualification; rather it is built entirely upon the idea of "the concept of the lesser evil." Indeed the typical case of SELF-DEFENSE is against an immediate danger to the person being attacked, but this too is not a sine qua non: See G. Williams, op. cit., p. 503: "The use of force may be immediately necessary to prevent an attack in the future.

As regards the question under discussion: the harm done by violating a provision of the law during an interrogation must be weighed against the harm to the life or person of others which could occur sooner or LATER. This is the idea underlying the three conditions of Sec. 22. Prof. Paul H. Robinson of Rutgers University illustrates this choice in his monograph on "Criminal Law Defences,"[18] which contains the most complete discussion known to us on this topic. Under the heading "Lesser Evil Defence (Choice of Evils, Necessity)" (Vol. 2, p. 45) he gives the following example:

> "Suppose a ship's crew discovers a slow leak soon after leaving port. The captain unreasonably refuses to return to shore. The crew must mutiny in order to save themselves and the passengers. If the leak would not pose an actual danger of capsizing the vessel for two days, should its crew be forced to wait until the danger is IMMINENT, even though the disabled ship will be too far out at sea to reach shore when it is? Or should they be able to act before it is too late, even

[18] West Publishing Co. (1984).

though it may be several days before the danger of capsizing is present?'' (Robinson, pp. 56–57).

And as an additional example, closer in it facts to our subject (Robinson, p. 58):

> ''Consider the case of the bombmaker, X, whose construction plans require a 10-day period for building the weapon. Suppose further that the actor, D, knows that X is going to set off the bomb in a school. He also knows that X's construction plans require 10 days to build the weapon, and that police and other authorities are unavailable to intervene. Under the simple requirement that the conduct be 'necessary', the actor could trespass on X's property and abort the plan by disabling the bomb at any time, including the first day, as long as such an action was the least drastic means of preventing the project's completion. Under the 'immediately necessary' restriction, the actor would be obliged to wait until the last day, presumably until the last moment that intervention would still be effective.''.

Here, the learned author comments that the second alternative is justified only to enable A to abandon his scheme in the meantime; however, many legislators would prefer to protect society at the cost of earlier intervention against one plotting such a scheme.

We are in accord with these remarks. They are consistent with the wording of our statutory provision in Sec. 22, which, as stated, makes no mention of any particular requirement for the imminence of the danger, but posits instead the flexible test of ''the concept of the lesser evil,'' as in the example of the aforementioned provision in the Model Penal Code.

3.13 Regarding the first condition, the information which an interrogator can obtain from the suspect, about caches of explosive materials in the possession or knowledge of the suspect, about acts of terrorism which are about to be perperated, about the members of a terrorist group to which he belongs, about the headquarters of terrorist organizations inside the country or abroad, and about terrorist training camps – any such information can prevent mass killing and individual terrorist acts which are about to be

carried out. GSS investigators are charged with the task of protecting the citizenry against this as part of their official tasks, as stated in Sec. 22. It should be noted here that Prof. Feller maintains[19] that "a security interest of the State is not among the social values worthy to be saved from the danger of grave and immediate attack, without assuming the risk of being held accountable under the law for a crime committed in the act of rescue..." May we remark that it is a salient security interest of the State to protect the lives of its citizens, and the duty to defend them, imposed on the State, certainly falls within the category of the need to prevent bodily harm or grievous injury, as stated in Sec. 22.

The proposal for the General Part of a new Penal Code which was drawn up by Prof. Feller and Dr. M. Kremnitzer following the work of a Committee headed by Justice Agranat and published in the "Mishpatim" Journal[20] maintains, in Sec. 45 ("necessity of circumstances"), that a "security interest of the state" is also among the protected interests. We do not believe that this addition is required in regard to the security interest to protect the general public, for the public is composed of individuals needing protection of their lives and their bodily integrity. In addition, the State, as the framework for social existence, needs protection against the machinations of terrorist organizations aimed at undermining its foundations and destroy it.

3.14 The second condition embodied in Sec. 22 is that it was impossible to prevent the anticipated harm in any other way. It has already been explained above, in regard to GSS interrogations, that the information possessed by a member of a terrorist organization (or a member of a group of local persons which has organized at its own initiative to perpetrate acts of terrorism) cannot be uncovered except through the interrogation of persons concerning whom the GSS has previous information about their affiliation with such an organization or group; we also saw that without some such previous information the GSS does not commence the interrogation of a suspect. Without such an interrogation there is no way to get to the arms caches and explosive materials stores, the location of which is a secret known only to the

[19] ibid. at p. 399.

[20] Vol. 14 (1984), at pp. 127 ff.

suspect and the members of his group – and only he can reveal information about fellow members of his group to his interrogators.

3.15 The third condition is that, for the purpose of obtaining this information, the interrogator did not do more than was reasonably necessary and did not thereby cause disproportionate harm under the circumstances. This condition should be discussed in light of "the concept of the lesser evil," with which we have dealt above. We will again begin with an extreme example, from an article by Adrian A.S Zuckerman of Oxford University, which was published in the January 1986 issue of the "Law Quarterly Review," entitled "The Right against Self-Incrimination: An Obstacle to the Supervision of Interrogation." On page 45 he discusses the inadmissibility of a confession obtained by beating a person interrogated, and adds (in Footnote 4):

> "This is not to say that it is impossible to envisage situations where the organs of the State may excusably resort to torture. Where it is known that a bomb has been planted in a crowded building, it is perhaps justifiable to torture the suspect so that lives may be saved by discovering its location."

This is an extreme example of actual torture, the use of which would perhaps be justified in order to uncover a bomb about to explode in a building full of people. Under such circumstances, the danger is indeed imminent. However, we cited above additional examples from Prof. Robinson's monograph, in which vigorous action to prevent the danger of loss of life is also justified, even though the danger will only be realized in course of time. And indeed, when the clock wired to the explosive charge is already ticking, what difference does it make, in terms of the necessity to act, whether the charge is certain to be detonated in five minutes or in five days? The deciding factor is not the element of time, but the comparison between the gravity of the two evils – the evil of contravening the law as opposed to the evil which will occur sooner or later; and as was already stated above, weighing these two evils, one against the other, must be performed according to the concepts of morality implanted in the heart of every decent and honest person. To put it bluntly, the alternative is: are we to accept the offence of assault entailed in

slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.

3.16 Everything depends on weighing the two evils against each other. The correct test for this is what the doer of the deed reasonably believed, and not what the situation actually was. See Perkins & Byoce, p. 1071:

> "The determinant is in terms of belief and not actuality. It is not whether the harm avoided was in fact greater than the harm caused, but whether the defendant reasonably believed it to be so. If it were necessary to bring in extrinsic evidence to determine the actual degree of the unrelated harms, the result might be in some case, although human life was in no way involved, that defendant would be convicted for doing what any ordinary person would have done under the circumstances – and that is not acceptable."

It is true that strict care must be taken, lest a breach of the structure of prohibitions of the criminal law bring about a loosening of the reins, with each interrogator taking matters into his own hands through the unbridled, arbitrary use of coercion against a suspect. In this way the image of the State as a law-abiding polity which preserves the rights of the citizen, is liable to be irreparably perverted, with it coming to resemble those regimes which grant their security organs unbridled power. In order to meet this danger, several measures must be taken: first, disproportionate exertion of pressure on the suspect is inadmissible; the pressure must never reach the level of physical torture or maltreatment of the suspect or grievous harm to his honour which deprives him of his human dignity. Second, the possible use of less serious measures must be weighed against the degree of anticipated danger, according to the information in the possession of the interrogator. Third, the physical and psychological means of pressure permitted for use by an interrogator must be defined and limited in advance, by issuing binding directives. Fourth, there must be strict supervision of the implementation in practice of the directives given to GSS interrogators. Fifth, the interrogator's superiors must react firmly and without hesitation to every deviation from the

permissible, imposing disciplinary punishment, and in serious cases by causing criminal proceedings to be instituted against the offending interrogator. (In the second, secret, part of his Report, these means are defined more precisely.)

3.17 Here we would like to add some words from an author, about the cruel dilemmas a State which believes in liberal principles must face in the war against terrorism which threatens ist existence. Professor Paul Wilkinson of Aberdeen University, Scotland, writes in his book, "Terrorism and the Liberal State"[21]:

> "...internal terrorism is after all a particularly barbaric form of unconventional war and political leaders and decision-makers may need to make tough and unpleasant decisions to safeguard the security of State and citizens... In the final analysis terrorists are engaged in a test of will with the democratic community and its leaders." (p. 105).
>
> "Ultimately the liberal State has no deus ex machina it can rely upon to rescue it from the agonizing political and moral dilemmas of waging war on terrorism. In the end each sovereign liberal state is left to shift as best it can in the constant struggle to uphold the rule of law and to protect the life and limb of its citizens." (p. 234).

Admissibility of a Confession as Evidence in a Trial

3.18 We will now proceed to discuss the admissibility in a criminal trial of confessions obtained from persons interrogated in GSS investigations, which were conducted in accordance with the directives to which we have just referred. A clear distinction must be drawn between this subject and the subject of what is permissible and what is precluded in an interrogation: the confession obtained may fulfil the directives for conducting the interrogation, yet at the same time be rejected as evidence in criminal proceedings brought against the person who made the confession (and when the confession is the main evidence available to the Prosecution, the accused will

[21] John Wiley and Sons, New York (1977).

necessarily be acquitted, if the confession is rejected). On the other hand, the interrogation which brought about the confession may have been conducted in violation of directives given to the interrogator, but the Court will nevertheless accept it as valid evidence. This depends on the judicial rulings which it is for the Supreme Court to evolve, in interpreting Sec. 12 on the Evidence Ordinance, which states that the confession of an accused will be admitted only if it is proved that the confession was made "freely and voluntarily." Similarly, Sec. 477 of the Military Juristiction Law, 1955, states that: "A military court shall not admit the confession of an accused as evidence unless it is convinced that the accused made it of his own free will." As is well known, this provision was also imported from the rules of evidence of the English common law. The body of jurisprudence which developed in Israel around the term "freely and voluntarily," from the first days of the State until now, is wide-ranging and tortuous, and we do not intend to explore it fully here. Suffice it to say that the term "freely and voluntarily" was in the past interpreted in the spirit of English precedents, as disqualifying confessions obtained as a result of a promise made to the suspect or a threat made to harm him, if he would not talk. In addition, the concept of "freely" was imbued with a meaning which is far from its normal meaning in human discourse: that a confession be considered "free and voluntary", as long as the suspect had the freedom of choice between two possibilities: to observe his right to remain silent, or to make a confession in order to remove the pressure of the interrogation.[22] On the flexible English rule concerning the freeness of a confession, see the judgment of the House of Lords in D.P.P. v. Ping Lin (1975) 3 All E.R. 175, 182, 188.

By the way, we will mention here that whereas in Israel judicial decisions are still struggling with the legacy of English common law on the question of "free will," in England itself, the test of "freely and voluntarily" has already become outmoded, due to the intervention of the legislature, in Sec. 76(2) of the Police and Criminal Evidence Act, 1984. This section disqualifies as evidence in court a confession obtained by oppression against the person confessing, or if it is made as a result of something said or done

[22] See Cr. A. 307/60, in the Hussein Yassin case, 17 Pinskei Din, 1551, at p. 1553.

which was liable to make the confession unreliable (even though the confession might be truthful). This provision was enacted following the 11th Report of the Criminal Law Revision Committee. The term "oppression" is defined in Sec. 76(8) as including "torture, inhuman or degrading treatment and the use or threat of violence (whether or not amounting to torture)."

This innovation in statutory English law opened a new era in relation to the admissibility of confessions, and the English courts need no longer follow previous judgments concerning the "freeness" of the confession.[23]

3.19 The rulings of our Supreme Court are still formally confined to the Procrustean bed of Sec. 12 of the Evidence Ordinance. Over the years, however, the Court has gone a long way toward admitting confessions taken from accused persons by means of pressure that are far from testifying to the free will of the person confessing. A survey of this development may be found in Professor Harnon's book on the Law of Evidence, on page 248 ff. The Military Courts in the territories are also following these precedents, without applying the proviso of Sec. 9 of the Order on Security Directives,[24] that "a Military Court is authorized to deviate from the laws of evidence for special reasons, which shall be recorded, if it seems to it just to do so." Until now, this development has crystallized, from the legal point of view, in the judgment in the case of the Mu'adi brothers.[25] In the full opinions written by the three judges who sat in that case, previous judgments are reviewed. It is true that the Court rejected the view that a confession taken by use of excessive pressure must be disqualified without even investigating whether it is truthful – a question over which the judges disagreed in the earlier Abu Midjem case.[26] The court reaffirms the test of the credibility of the confession, and also adopts the earlier interpretation which equates the freedom of choice of the person interrogated with his free will.[27] Nevertheless, the judges introduce a reservation by disqualifying confessions

23 See R.v.Fulling (1987) 2 W.L.R. 923.
24 Preisler, p. 6.
25 Cr.A. 155/82 18(1) Piskei Din 197.
26 Cr.A. 183/78, 34 (4) Piskei Din 533.
27 At pp. 246-247.

obtained by violating basic accepted values.[28] Therefore a confession obtained by physical abuse, or in a way that arouses feelings of moral repugnance, will ipso facto be disqualified.[29] But, says the late Supreme Court President Y. Kahan, quoting an earlier ruling, "the gravity of the offence at issue can affect the court's willingness to admit the confession given, and judicial policy on this subject may change, as the need grows to combat an increase in crime."[30]

The judgment recently given in the appeal of Avrushmi,[31] is in the same spirit. According to this line of thought, the court is willing to admit a confession obtained in a protracted interrogation, including interrogation at night, if there was substantive justification for continuing the interrogation,[32] and a confession obtained by means of a ruse,[33] including the use of an agent provocateur vis-a-vis the accused, will not be rejected. It may be said that at present judicial precedent allows the admissibility of a confession, even if it was obtained from the accused by means of pressure or by misleading him, as long as the interrogator did not use extreme means which contradict accepted basic values or are degrading. Other evidence obtained by means of an inadmissible confession ("the poisonous tree") is not disqualified under the law obtaining in Israel,[34] nor has the Miranda ruling handed down by the U.S. Federal Supreme Court, which disqualifies confessions given without a warning, been accepted here. It should be noted that from then (1966) until now, these strict requirements have been eroded there, too, on grounds of public safety: New York v. Quarles 104 S. Ct. 2626 (1984).

The time has come for our legislature, too, to have its say on the admissibility of confessions in criminal proceedings. Two possible versions for this were proposed in Sec. 37 of the new Bill of the Law of Evidence, 1985, published by the Ministry of Justice.[35]

28 At p. 224.
29 At pp. 249-250.
30 At pp. 245, 248.
31 Cr.A. 154/85, 41 (1) Piskei Din 387.
32 Cr.A. 408/79, 34(2) Piskei Din 272.
33 Cr.A. 115/82, 38 (1) Piskei Din, at p. 245.
34 (1966) 384 U.S. 436.
35 See in 16 "Mishpatim", p.3., and Explanatory Notes ibid. pp. 26-27.

Additional Legislation

3.20 We will now complete our brief survey of the law in Israel and the territories, as to the investigation of suspects of HTA crimes, by citing various provisions which are not directly related to the conduct of the interrogation, but do indirectly affect the position of a person subject to the process of investigation.

(a) Regarding the DETENTION AND RELEASE ON BAIL of a person under investigation and suspected of HTA, who is about to be brought before a (District) Court, the applicable provisions are the Criminal Procedure (Arrest and Search) Ordinance (New Version), 1969, and Part C of the Criminal Procedure Law (Consolidated Version), 1982. When he is to be brought before a Military Court, under the Defence (Emergency) Regulations, 1945, regulations 16, 17 and 72 of these Regulations apply.

In the TERRITORIES, the DETENTION of a person suspected of violating the Order Concerning Security Provisions (Judea and Samaria) (No. 378), 1970, is regulated by Sec. 78 of the order, which allows for his detention by order of a Police officer for a total of 18 days.[36] A Military Court may order detention for a period which does not exceed six months, and, after submission of the indictment, until the conclusion of the trial. Release on Bail is dealt with in Sec. 78(i) and Sec. 79 of the order.

(b) Regarding a DETAINEE'S MEETING WITH A LAWYER, the applicable provisions are Sec. 29(f) of the Criminal Procedure Law and the Criminal Procedure Regulations (Detainee's Meetings with Lawyer), 1981. According to this legislation, the person in charge of the investigation (including the Head of the Investigation Unit, who was thus authorized by the GSS Chief) may prevent a detainee suspected of HTA crimes from meeting [with his lawyer] for a total period of 15 days. After the investigation is concluded, a meeting with a lawyer must be permitted at all events. In the territories, the applicable provision is Sec. 11 of the Order Concerning Detention Premises, 1967,[37] according to which the commander

[36] In Preisler erroneously: six months.

[37] Preisler, p. 377.

of detention premises shall allow a meeting of a detainee (as defined in Sec. 1 of that order) with a lawyer, if the commander is convinced that the request for a meeting was submitted to deal with the legal position of the detainee; provided there is no security bar to the holding of the meeting, and that the meeting will not adversely affect the course of the investigation.

In Misc. Appl. 832/82, Piskei Din 36(4) 775, it was decided by the Supreme Court that at a hearing of an application for release on bail (which may be submitted at an early date) no contact may as yet be permitted between the detainee and a lawyer. Precedent also establishes that, at a hearing of such an application, the Prosecution's representative may submit evidence which is confidential for the perusal of the judge alone, without revealing it to the detainee or to his lawyer.[38]

(c) According to Sec. 28 of the Criminal Procedure Law, the detainee's next of kin must be INFORMED OF HIS DETENTION and the place of his detention without delay, as must the lawyer named by the detainee at the latter's request. Under Sec. 30 of this Law, however, this information may be delayed for a period not to exceeding 15 days (in addition to the days of delaying a meeting with a lawyer, according to Sec. 29(f), as noted above). VISITS BY RELATIVES to a detainee in the territories are subject to the decision of the commander of the detention premises, who may prohibit visits with the detainee for security reasons (Sec. 12 of the aforementioned Order Concerning Detention Premises).

(d) Visits by representatives of the RED CROSS with HTA detainees, in the spirit of Art. 143 of the Fourth Geneva Convention, are arranged under an agreement made with that organization in 1979, according to which a Red Cross representative may visit any detainee (even if he is still undergoing interrogation) within 14 days of his arrest, and for this purpose the Red Cross will be informed of the arrest within 12 days – subject to a proviso for compelling reasons which require a deviation from this arrangement.

[38] Adm. Det. App. 1/80, 35 (2) Piskei Din 253, 258; H.C. 732/80, 35 (1) Piskei Din 499, 502.

International Conventions

3.21 We shall now briefly survey the provisions of international conventions relating to the methods of interrogation of persons suspected of terrorist activity. We do so although the State of Israel is not formally bound by these conventions. However, in the chapter of this report in which we shall submit our conclusions and recommendations, we shall take note of what they contain, with the aim of abiding by the general prohibitions they posit:

(1) Art. 5 of the Universal Declaration of Human Rights: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

(2) The International Covenant on Civil and Political Rights, which was passed by the United Nations General Assembly on 16.12.1966, reiterates Art. 5 of the above-mentioned Universal Declaration in Art. 7, adding in Art. 10(1) that "all persons deprived of their liberty shall be treated with humanity, and with respect for the inherent dignity of the human person."

(3) Similarly, the European Convention on Human Rights, which was entered into by the member-states of the Council of Europe and took effect in 1950, states in Art. 3 that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

3.22 Under Art. 19, complaints about Convention violations are brought before the European Commission of Human Rights, and its decisions may be appealed in the European Court of Human Rights. A matter of special interest for us is the Judgment of the European Court of 18.1.78 on Ireland's complaint against the United Kingdom.[39] Discussed there were certain methods used by the Northern Ireland police force in its "interrogation in depth" of persons suspected of terrorism. This is how the Court describes these five methods,[40] which were termed "techniques" of "disorientation" or "sensory deprivation".

39 Series A No. 25.

40 At p. 41 of the Judgment.

(1) Being made to stand against a wall for several hours "in a stress position", with fingers above the head, legs spread apart and standing on the toes, so that body weight is chiefly on the fingers and toes. Persons under interrogation were made to stand in this position for periods of between 6 and 15 hours.[41]

(2) Covering the head with a bag continually, except during interrogation.

(3) Keeping persons under interrogation in a room full of a constant, loud hissing noise.

(4) Deprivation of sleep between interrogation sessions.

(5) Reducing diet and drink during interrogations.

These methods were given "high level" approval. Northern Ireland Police were briefed on their use at the Centre for British Intelligence, in a seminar held in April 1971. The European Commission on Human Rights emphasized that ill-treatment must reach a certain severe level, in order to be included in the ban contained in Art. 3 of the Convention. The Commission found that the above-mentioned methods could be construed as torture, in the sense of Art. 3. However, the Court disagreed with the Commission. It ruled that the term "torture" meant "deliberate inhuman treatment causing very serious and cruel suffering," which should be branded with "a special stigma." Although the aim of the above-mentioned "techniques" was to extract confessions from those interrogated – in order to discover the names of others and to obtain information – and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the term "torture," as so understood. However, these same techniques, "as applied in combination," amounted to inhuman and degrading treatment. (The words "as applied in combination" almost seem to be echoed by the Supreme Court's remarks on the Nafsu case, since according to the statement made by the Government's representative, "the GSS investigators went beyond the permissible, in his opinion, in terms of the combined weight of their actions...") In other words, it remains to be

[41] See in the Parker Report (para 3.27, infra) at p. 12.

considered whether each of these acts separately constituted a deviation form what is permissible.

3.23 In the opinion of the European Commission of Human Rights, on complaints by a number of States against Greece, pertaining to violations of Art. 3 of the European Convention in the interrogation of political prisoners (The Greek Case), published in the 1969 Yearbook of the European Convention on Human Rights, it is stated that the Greek security forces violated the Article's provisions by their methods of interrogation. In discussing these cases, the Commission notes:[42]

> "It appears from the testimony of a number of witnesses that a certain roughness of treatment of detainees by both police and military authorities is tolerated by most detainees and even taken for granted. Such roughness may take the form of slaps or blows of the hand on the head or face."

In this context the Commission remarks that the amount of physical violence which detainess are ready to accept, as being neither cruel nor inordinate, varies between different societies, and even between different sections of them. Such distinctions between individuals seem questionable to us. At all events, the implied conclusion is that the Commission itself held that a moderate measure of physical violence of this kind does not violate the prohibition in Art. 3, relating to torture and inhuman or degrading treatment.

3.24 Article 31 of the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War, the humanitarian provisions of which Israel undertook to carry out, states:

> "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."

This provision should be read together with Art. 5 of the Convention, which deprives a person who is under definite suspicion of activities hostile to the security of the State, or who is engaged in such activities, of the rights and

42 At p. 501.

privileges under the Convention, to the degree that the granting of such rights harms the security of the State. Nevertheless, such persons are entitled to humane treatment, and if put on trial they are entitled to a fair and regular trial.

Reports on Northern Ireland

3.25 The problem central to our discussion is how a State which advocates liberal principles of human liberty is to cope with terrorist activity, which seeks to undermine that State's very existence. On this question we have found instructive comparative material from a series of Reports by various British Commissions that probed the methods of interrogation employed by the British security forces in Northern Ireland to suppress the acts of terrorism that erupted there in 1969 and which are continuing to this day. Although the comparison is not perfect, since the aim of the terrorism there is to detach Northern Ireland from the United Kingdom, whereas the Arab terrorism against Israel aims at destroying the State altogether. In principle, however, the dilemmas with which those Commissions of Inquiry had to cope are not different from those confronting us.

3.26 In November 1971 the Compton Commission[43] reported about complaints concerning the use of violence against detainees held by the Army and the Police during "in depth investigation," using "techniques" later described in the Judgment of the European Court of Human Rights in Ireland's complaint against the United Kingdom (see Section 3.22 above). The Commission drew a clear distinction between "physical brutality" and "physical ill-treatment." It defined brutality as "an inhuman or savage form of cruelty implying a disposition to inflict suffering, coupled with indifference to the victim's pain or pleasure in it."[44] If found[45] that brutality had not been proved, but viewed the "techniques" as involving physical ill-treatment.

43 Cmnd. 4832.
44 Para 105, at p. 23.
45 P. 71.

3.27 In November 1971 a Report was submitted by a Commission headed by Lord Parker of Waddington,[46] which had been appointed "to consider authorized procedures for the interrogation of persons suspected of terrorism." There was an appendix to this Report entitled "Joint Directive on Military Interrogation in Internal Security Operations Overseas," of 1965, as amended in 1967. Section 2 states:

> "Successful interrogation... calls for a psychological attack. Apart from legal and moral considerations, torture and physical cruelty of all kinds are professionally unrewarding since a suspect so treated may be persuaded to talk, but not to tell the truth. Successful interrogation may be a lengthy process."

It went on to state that the principles set forth in the Geneva Convention should be observed, and accordingly, suspects should be treated humanely, and cruel treatment, torture and outrages on human dignity, particularly humiliating and degrading treatment, are prohibited. However (para. 8):

> "To obtain successful results from interrogation, the actual and instinctive resistance of the person concerned to interrogation must be overcome by permissible techniques. This will be more readily achieved by sustained interrogation in an atmosphere of rigid discipline, It may therefore be necessary for interrogation to be carried out continuously for long periods both by day and by night with consequent disruption of the normal routine of living."

The majority of the Commission (Lord Parker and another member) did not reject these directives. As regards the "techniques," they emphasized their effectiveness in obtaining information essential for saving human life. They did not advocate the principle that the end justifies all means. "The means, in our opinion, should be such as not only conform to the directives, but can also be morally affirmed, taking into consideration the existing circumstances."[47] (It should be recalled that the directives themselves sanction modes of interrogation intended to overcome the suspect's desire to

[46] Cmnd 4901.
[47] Para 27.

remain silent.) Their conclusion is[48] that "the answer to the moral question is dependent on the intensity with which these techniques are applied and on the provision of effective safeguards against excessive use... Subject to these safeguards, we have come to the conclusion that there is no reason to rule out these techniques on moral grounds and that it is possible to operate them in a manner consistent with the highest standards of our society."[49] They go on to determine the required guarantees including, inter alia, giving the interrogators guidelines, any deviation from which must be fully reported. These guidelines are to be secret and will be issued by a U.K. Minister following consultation with a small committee of experts to be appointed by the Prime Minister which is to keep them under periodical review.[50]

The third Commission member, Lord Gardiner, disagreed with the majority opinion. He noted that the above directives contradict the laws of England and Northern Ireland, and rejected the "techniques." Instead, he proposed the use of interrogation methods that were employed on German prisoners of war and which were conducted "with kindness and courtesy," but were nevertheless effective "owing to the overwhelming desire to talk with another human being, whatever the circumstances."[51] It is not surprising that the majority differed with this optimistic approach.[52]

3.28 Another Commission was appointed in 1972, headed by Lord Diplock, a Law Lord, to consider "Legal Procedures to deal with Terrorist Activities in Northern Ireland."[53] In its Report, the Commission very reluctantly reached the conclusion that there is no choice but to continue with the administrative detention of those suspected of terrorist activities, who cannot be brought to trial due to the absence of witnesses willing to testify against them, for fear that they would be retaliated against.[54] The Commission devoted a special section of its Report to the subject of the

48 Para 34.
49 Para 34.
50 Para 36 & 37.
51 pp. 18-19.
52 Paras 25-26, ibid. at p. 6.
53 Cmnd 5185.
54 Para 27-34 of the Report.

admissibility of an accused's confession. It noted[55] that the historic source of the rules of English law on this matter, which are "highly technical," lay in the period when the accused was not allowed to testify at his own trial, and there is no doubt that originally "the concept of 'admissibility' was introduced to compensate the accused for the handicap in challenging the reliability of the confession as evidence of his guilt."[56] The Commission then remarks[57] that the concept of the voluntariness of a confession which was evolved in judicial decisions "today bears a highly technical meaning." If the Judges' Rules were applied strictly, every confession made after a suspect's arrest would have to be declared invalid unless he volunteered to give it of his own initiative. "Guilty men do not usually do so. If left to themselves, they prefer to remain silent."[58] Accordingly, the Courts found a way to circumvent the Judges' Rules. "The fact that it was incredible that a confession only obtained at the conclusion of several sessions of prolonged questioning would have been volunteered by the subject of his own initiative, was not in practice treated by the judges as rendering it 'inadmissible'."[59] Therefore "if human lives are to be saved and the destruction of property prevented in Northern Ireland, it is inescapable that the security authorities must have the power to question suspected members of terrorist organizations. The technical rules as to the 'admissibility' of inculpatory statements, which are currently applied in Northern Ireland (in accordance with the practice in England), are hampering the course of justice in the case of terrorist crimes."[60] Although the Diplock Commission is not prepared to condone the techniques described by the Compton and Parker commissions, it rejects the "draconic" version (which recalls the controversy in the Abu-Midjem case) to the effect that the credibility of a confession is its sole test, even if it is obtained through "methods which flout universally accepted standards of behaviour." It proposes to get free of the technical rules concerning the admissibility of confessions and to provide by law, following

55 Para 73.
56 Para 79.
57 Para 80.
58 Paras 81-82.
59 *ibid.*
60 Para 8.

Art. 3 of the European Convention, that every confession shall be admissible unless it is proved that it was obtained through "torture, or inhuman or degrading treatment."[61] The Diplock Commission in effect puts its trust primarily in methods of psychological pressure. This recommendation was accepted by the legislator, in sec. 8 of the Northern Ireland (Emergency Provisions) Act, 1973, (and now a similar provision in sec. 8 of a Statute by the same name, of 1978). It should be noted that a provision similar to this was later adopted in the definition of "oppression," which today appears in the above sec. 76(8) of the Police and Criminal Evidence Act, 1984.

3.29 Later, too, Commissions of Inquiry continued to discuss the legal aspects of the war against terrorism in Northern Ireland. Among these, we wish to mention another Report, of a Commission headed by Judge Bennett, concerning Police Interrogation Procedures in Northern Ireland,[62] of 1979. We direct attention to Chapter 3 of this Report, entitled "Methods of Interrogation." There, in para. 37, the Bennett Commission states that confessions are made only "in an interrogation procedure with the right atmosphere. They will not be made in the atmosphere of a casual conversation, or cosy fireside chat. Persistent, forceful questioning may be needed."

And in para. 41 it poses the question:

> "...how far a liberal democratic society thinks it right to proceed in its methods of crime detection. The situation in Northern Ireland poses the classic dilemma for such a society in its sharpest form. On the one hand that society is subject to violent attack aimed at its overthrow, and its people are killed, maimed and despoiled; on the other, that society seeks to assure its people freedom under the law from violence and oppressive conduct... this dilemma... the solution to which can only rest in the hands of the political sovereign..."

Indeed, enlightened regimes subject to the threat of terrorism are faced with identical situations.

61 Paras 88-89.
62 Cmnd. 7494.

In para. 178 ff. of its Report, the Bennett Commission recommends the introduction of a "code of conduct" for interrogators, prohibiting acts defined as physical or mentally degrading ill-treatment. It should also be mentioned that the Commission rejects the idea of outside supervision over Police interrogation activities.[63] It prefers internal supervision by senior Police officers, including observation of what goes on within interrogation rooms through closed-circuit television.[64]

63 Para 202.

64 Para 224 et seq.

Chapter Four: Conclusions and Recommendations

4.1 In this last Chapter of the Report we have to draw our conclusions from all that has been stated above. We also consider it right to add recommendations on suitable procedures for investigations of HTA in the future, and further recommendations in which we shall point to a way out of the tangle in which the Service has become involved, so that its members, and in particular members of the Investigation Unit, may be able to overcome the feelings of distress and anxiety due to the burden of the past that weighs on them. In our Letter of Appointment we were, as it were, guided to have regard, in formulating our recommendations, "to the unique needs of the struggle against HTA." It is hardly necessary to state that we are well aware of these needs, but no less have we directed our attention to those values of law and morals without which no civilized State can exist.

4.2 Three ways exist for solving this grave dilema between the vital need to preserve the very existence of the State and its citizens, and to maintain its character as a law-abiding State which believes in basic moral principles – for the methods of police interrogation which are employed in any given regime are a faithful mirror of the character of the entire regime.[65] And let us add here: all the more so with respect to the interrogation methods of a security service, which is always in danger of sliding towards methods practised in regimes which we abhor.

4.3 The first way proposed is to recognize that because of crucial interests of State security, the activity of the Security Services in their war against terrorism occurs in a "twilight zone" which is outside the realm of the law, and therefore these services should be freed from the bonds of the law and must be permitted deviations from the law.

This way must be utterly rejected. The law, which expresses the will of a free people, is the keystone for the existence of a State such as ours, which believes in values of liberty and equality. If the GSS, with its immense latent power, is not to be subject to the rule of law in its interrogations, who will

[65] Cr.A. 264/65, Artzi v. A.G., 20 (1) Piskei Din 225, 231.

determine its ways in that regard? Will it be its own conductor or will the political echelon lay down for it a legality of its own? It is easy to see that if this way is followed, control over the GSS is one day liable to fall into the hands of an unscrupulous person or group of persons, and from there to the despotism of a police state it is but a hair's breadth. If we do not preserve the rule of law zealously in this area as well, the danger is great that the work of those who assail the existence of the State from without will be done through acts of self-destruction from within, with "men devouring each other." If the GSS needs scope for its operations in addition to what the law of the land allows, the solution lies in convincing the legislator that the law should be amended, not in disregarding th existing law.

A version slightly different from the above would have the GSS subordinate to its own quasi-legal system, parallel to but separate from the law of the land, with the GSS acting on its own by setting up internal law for itself and scrupulously preserving that internal law, through the imposition of discipline and, when the need arises, punitive sanctions, on its own personnel. We saw that this path led the GSS into an impasse from which it must extricate itself, in order to take the high road of full obedience to the laws of the State, as regards its methods of interrogation.

4.4 The second way is that of the hypocrites: they declare that they abide by the rule of law, but turn a blind eye to what goes on beneath the surface. We found an apposite description of this frame of mind in an article by Prof. Joseph W. Bishop, Jr., of Yale University on "Control of Terrorism and Insurrection: The British Laboratory Experience."[66] Referring to harsh methods of interrogation, the author says (p. 166):

> "The inclination of the average, ordinarily humanitarian, Member of Parliament (or Congressman, or voter) is to tolerate the use of such methods, but only when they are 'unbeknownst' to him. Neither Parliament nor any responsible Minister was prepared explicitly to authorize the system of questioning described in the Compton Report..."

66 Law and Contemporary Problems, Duke University, Vol. 42 (1978), p. 140.

Or, in the figurative language of one of the GSS witnesses: It is convenient for the citizen to sit on the clean green grass in front of his house, while beneath him the refuse is washed away in the sewerage pipes.'' But the comparison is not apt, because it is impossible to isolate any one State authority from the overall social structure, and rot in one place is liable to spread and engulf the entire structure.

4.5 There is no alternative but to opt for the third way – the truthful road of the rule of law – also where this difficult subject is concerned. The law itself must ensure a proper framework for the activity of the GSS regarding Hostile Terrorist Activity (HTA) investigations, with all their attendant problems and dilemmas. At the conclusion of our long deliberations, we are convinced that this is essential for the moral strength of Israeli society and of the GSS as a part of it, and that it is feasible, on the lines we shall describe below.

Acts of terrorism have as their aim to deprive citizens of the State of a basic right, namely the right to life and to physical integrity. Organizations which set this as their goal have no moral right to demand that the State for its part maintain towards them the usual civil rights. Nevertheless, it is incumbent upon the State and its authorities, including the GSS, to preserve humanitarian behaviour and human dignity in their treatment of terrorists, in order to uphold the credo of the State itself as a law-abiding State grounded in fundamental concepts of morality. Any infringement of these basic concepts, even as against those who would destroy the State, is liable to recoil on us by engendering internal moral corruption.

4.6 We are convinced that effective activity by the GSS to thwart terrorist acts is impossible without use of the tool of the interrogation of suspects, in order to extract from them vital information known only to them and unobtainable by other methods.

The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information.

Interrogation of this kind is permissible under the lawn, as we interpreted it above, and we think that a confession thus obtained is admissible in a criminal trial, under the existing rulings of the Supreme Court.

4.7 The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided. GSS interrogators should be guided by setting clear boundaries in this matter, in order to prevent the use of inordinate physical pressure arbitrarily administered by the interrogator. As is set out in detail in the Second Part of this Report, guidelines concerning such boundaries have existed in the Service ever since the scope of investigation of HTA was expanded, as required by the new situation following the Six Days War. These guidelines underwent occasional changes, generally in the direction of restrictions on the use of physical force, which were imposed from time to time at the initiative of the political echelon, until today the authorization of physical contact with the person under interrogation is extremely limited.

4.8 These instructions are at present scattered among various internal GSS instructions. They should be collected in one document. In a Chapter of this Report, which for understandable reasons will be included in the second, secret Part, we have therefore formulated a code of guidelines for GSS interrogators which define, on the basis of past experience, and with as much precision as possible, the boundaries of what is permitted to the interrogator and mainly what is prohibited to him. We are convinced that if these boundaries are maintained exactly in letter and in spirit, the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity.

We note once again that no investigation is to be opened against a person unless information exists giving reasonable grounds to suspect that he is involved in some manner in HTA, or in political subversion which is

prohibited by law in Israel or the territories. The GSS has always followed this rule, and it is not to be deviated from.

The code of detailed guidelines which we recommend in the report's secret Part shall be brought annually for reappraisal before a small Ministerial Committee whose creation has already been recommended in another Report. This Committee can make whatever changes it deems fit, according to changing circumstances. Afterwards the guidelines will be made known to the Services Subcommittee of the Knesset's Defence and Foreign Affairs Committee.

Additional Recommendations

4.9 **Investigation Premises** – The Commission recommends immediate action to improve the conditions in those investigation premises which have not yet been improved. Those premises should be enlarged, outfitted with reasonable lighting and proper ventilation in the cells; if possible, daylight should be made to enter them. The lighting in the detention cells at night shall not be more powerful than is required in order to observe from outside what is going on in the cells. Sanitation and toilet facilities should also be attended to. The budgets required for this are modest in relation to the size of the problem. Also, a solution must be found which will enable the immediate transfer of suspects when the interrogation is completed.

4.10 The Farah detention premises, which are used chiefly for the interrogation of young persons, are not within the scope of responsibilities of the GSS, but of the IDF. GSS personnel provide only professional instruction to interrogators there. We received written complaints containing allegations about the use of violent interrogation methods in those premises. Since this subject is not within the purview of our Inquiry, we did not deal with these complaints. However, we believe that there is ground for an examination by the Defence authorities, concerning the interrogation methods currently employed in the Farah premises.

Conclusions and Recommendations Regarding Law and Legislation

4.11 We received a document on behalf of the GSS entitled "Legal Problems – Looking Into The Future." which contains a detailed proposal for legislation by the Knesset on issues related to HTA investigations and, inter alia, deals with the interrogator's powers and the duty of the person interrogated, the admissibility of statements made during HTA investigations, privilege for details the revelation of which might interfere with the foiling of terrorist activities, the defence of "necessity" with regard to activities for foiling of HTA, and additional related issues. It was proposed that these provisions be incorporated into the Prevention of Terrorism Ordinance, 1948. A great deal of thought went into these proposals and they deserve thorough study in order to clarify the preliminary basic question whether there are grounds for making special provisions in the law on HTA investigations and for an examination of the substance of the proposal in its details. We do not intend to go into such an examination on our part. The point is that, in view of the nature of the subject and the usual pace of legislative procedures in the Knesset, a considerable period of time would pass until these proposals in their present form, or similar proposals, would be enacted as primary legislation. Meanwhile, the need to put an end to the transitional period until the GSS regains its stability as soon as possible, is at present a vital and urgent one, both for the GSS and for the State. The proposal to introduce the suggested amendments for the time being in the form of Emergency Regulations also does not answer this need, since Regulations of this type have to be ratified by the Knesset three months after their promulgation (sec. 9(c) of the Law and Administration Ordinance. 1948) and this will, of itself, lead to a prolonged discussion in the Knesset. By this we do not mean to say that the issue is not worthy of such discussion, when the time for doing so will arrive.

4.12 It is our opinion that at least for the near future, the GSS can turn a new leaf, clean of blemishes, and maintain its vital activity in the war against Arab terrorism, within the framework of the existing law as we interpreted it above in the Chapter on "Legal and Moral Aspects." Similarly, the context of the existing law is sufficient for coping with the burden of the past which

is weighing down on the conscience of the best of investigators, who admitted to us that they erred by not giving truthful testimony in Court. Indeed, it is possible that the path to which we point will enable the GSS to operate for the long term, thus obviating the need to amend the existing law especially for it.

4.13 Regarding the methods of interrogation of HTA suspects, we dwelt at lenghth above on the central importance we attach to the defence based on necessity, under sec. 22 of the Penal Code. We analyzed the principle of "lesser evil" which is embodied in this provision, and explained that the great evil of HTA justifies counter-measures such as the need to act in the sense of sec. 22, not only when the perpetration of such activity is actually imminent, but also when it exists potentially, so that it is liable to occur at any time. We also detailed the restrictions and conditions which we believe should be imposed to the vital activity of interrogating HTA suspects through the use of pressure, including a code of guidelines which we drew up for GSS interrogators and which is included in the Second Part of this Report. We believe that these restrictions and conditions also pass the test of the prohibitions contained in the international Conventions which we cited above (para 3.21 ff.) for purposes of comparison. It is certain that the substance of the means of pressure permitted under these guidelines is less severe than the "techniques" which occupied the British Commissions of Inquiry that considered the methods of the war against terrorism in Northern Ireland. The guidelines properly preserve Israel's image as a law-abiding State which holds fast to fundamental moral values even in the face of the dangers coming from the terrorist organizations which threaten the existence of the State and the lives of its citizens – dangers unexampled in any other country on earth.

4.14 The issue of the admissibility of confessions from persons interrogated is dependent on rulings of the Supreme Court. In our opinion, our survey of the development of these rulings shows that confessions obtained by means of interrogation methods which appear to us to be justified, as explained above, will also be able to pass the test of the flexible rules of admissibility implicit in the leading judgment in the Mu'adi case.

We heard a proposal to solve the problem of admissibility of confessions by a total separation between the stage of interrogation by GSS personnel and the recording of a confession by a policeman which alone would be presented to the Court. We do not approve of this proposal. True, the Supreme Court ruled,[67] under special circumstances, that a later confession was made by the accused of his own free will, even though at an earlier stage he had made a confession which was rejected. Such a distinction is not invalid as such, but in a criminal charge following interrogation by GSS interrogators it would not be easy to convince the Court that the effect of pressure methods used by them on the person interrogated had ceased when the policeman recorded the confession which was later presented to the Court.

4.15 An investigator who is called to testify in Court or before any other authority empowered to hear evidence, shall testify only to the truth and the whole truth. This is a basic principle which must not be deviated from under any circumstances. It must be instilled strongly into investigators of all levels, and especially in new investigators during the courses they take before becoming authorized investigators in the field. This bitter lesson was learned well by all the levels of the GSS. 'The whole truth' menas also the full revelation of the means employed against the suspect, whenever this question arises in a trial. Another dilemma emerges here, stemming from the need to preserve the secrecy of the methods the GSS employs in its investigations. Here we do not refer to physical or psychological pressure exerted against a suspect. The interrogator must reveal the facts about these in full. But in addition to these the GSS uses methods the revelation of which is liable to nullify their effectiveness at once. In a hearing concerning the request for a remand in custody or for release on bail, secret material of this kind may be submitted without its being revealed to the detainee or his lawyer. As regards the trial itself, we are unaware of any solution to this dilemma other than the submission of a Certificate of Privilege from the Prime Minister or the Minister of Defence, under sec. 44 of the Evidence Ordinance, 1971 (or, in the territories, from the commander of the territory, under sec. 9a of the Order on Security Provisions)[68] attesting that the

67 In Cr.A. 69/53, 7 Piskei Din 801, 807 ff. (the Sich case).

68 Preisler, at. p. 6.

disclosure of the method is liable to harm State security (or the security of the territory). The apprehension was expressed to us that by the very refusal of a GSS witness to reply to a certain question, he is liable to bring about the identification of the method covered by privilege. We assume that this difficulty can be overcome by means of drawing up a Certificate of Privilege in a manner which will prevent at once, in limine, questioning about methods covered by privilege.

Claiming privilege for part of the incriminating evidence against an accused and its non-submission at the trial are liable to weaken the Prosecution's case to the point where the accused will be acquitted, although his guilt is clear from the secret evidence which cannot be be submitted in Court. This possibility must be assessed in advance, in absolutely frank consultation between representatives of the GSS and of the Prosecution (civil or military). A procedure on this matter was recently drawn up – on 2 June 1987 – for the interim period until the submission of this Report of ours. We were told that it is still under discussion between those concerned. A permanent arrangement such as this should be worked out.

4.16 Whenever it is found that a person against whom incriminating evidence exists concerning his guilt in HTA or hostile political subversion, is not to be brought to trial because of the necessity to claim privilege for all or part of the evidence, consideration should be given as to whether the circumstances warrant giving an administrative detention order under the Emergency Powers (Detention) Law, 1979 (within the "Green Line"), or Regulation 111 of the Defence (Emergency) Regulation, 1945, or an confinement order under Regulation 109 and 111 of the said Regulations. In particularly severe cases, resort can be had to deportation, under Regulation 112 of the Defence (Emergency) Regulations. It is well known that objections in principle exist regarding the use of these measures, and in particular the harsh measure of uprooting a person from his surroundings and deporting him. However, we found that this measure, exactly because of its very harshness, has a considerable deterrent influence in restraining terrorist acts and hostile subversion. It is obvious that recourse to it must not become a matter of routine, but its occasional use according to needs of the moment should not be completely ruled out. A proper examination of the facts is

ensured both with regard to an administrative detention order, in the above-mentioned Law of 1979, and regarding administrative detention and deportation by means of an appeal to the Advisory Committee, under Regulations 111(4) and 111(8), to which all the evidence will be submitted, and from there the way is also open to petition the High Court of Justice.

4.17 We discussed (para. 3.20) the existing law regarding arrest for investigation and trial, release on bail, contact between a person under investigation and his lawyer, and visits by relatives. We do not recommend a change of the law on these subjects except in the following matters:

(a) We explained there that in the terrorities a person may be detained for a total period of 18 days before the matter of his detention is brought before a judge. We support the proposal to shorten this period and recommend that the question of prolonging the detention be brought before a judge no later than the eighth day after the day of his arrest.

(b) A draft was submitted to us of an amendment to the Order on Security Provisions, which was drawn up by the Military Advocate General, in which he defines more precisely the right of a detainee in the territories to meet with a lawyer, and other matters. We support this tendency towards clear definitions, as against the broad discretionary power which currently exists on these subjects.

(c) On the other hand, we were impressed by the testimony of GSS personnel who pointed out to us that applications for the relase on bail of a person under investigation are submitted by their lawyers as a matter of course close to his arrest, even though there is no chance that the Court will grant the request at such an early stage. In the meantime serious disruption is caused to the interrogation itself – which generally must proceed continuously especially in its initial stages – because of the need to bring the suspect before the Court. In some cases this necessitates his being brought a considerable distance from his place of detention to the Court. Since in any case no contact is permitted at this early stage between the detainee and his lawyer (see above, para. 3.20), we propose that a regulation be made whereby in the territories it will not be necessary to bring a person under

interrogation for HTA before a judge to hear a request for his release on bail, until seven days after his detention.

4.18 In this Chapter of conclusions and recommendations, we shall now return to the issue of supervision and control of GSS interrogation methods of HTA suspects.

We shall begin by noting that false complaints by suspects concerning severe torture sustained by them during interrogation by the GSS, and other gross exaggerations to this effect, are commen as part of the systematic campaign conducted by terrorist organizations against the GSS, with the aim of weakening it in its war against HTA and tarnishing its image in the eyes of well-wishing individuals and organizations, by presenting it as a ruthless organization engaged in the torture and maltreatment of innocent "freedom fighters". Suspects who confessed to their guilt during interrogation sometimes employ false complaints about torture in order to justify towards their organization the fact of their having confessed. The first task in investigating such complaints is therefore to distinguish true complaints from false ones.

4.19 The new control arrangements inside the Investigation Unit are now about to receive their final form, and the activities of the recently appointed GSS Comptroller give us reason to hope that control and supervision will be strengthened to ensure that GSS investigations of HTA suspects are carried out according to existing rules and directives. We think, however, that these measures do not suffice. The indispensable secrecy and strict compartmentalization of interrogation activities must clearly be preserved, yet these considerations should not result in the GSS being hermetically closed to any outside criticism – which has been the case so far, with some rare exceptions. On the contrary, there is ground for the belief that had such external criticism existed, the GSS would not have got entangled in so harmful an over-exposure due to the grave failures which now require a thorough house-cleaning is one of its units. We hold that external control and supervision should be maintained on several levels:

(a) Sanctions in response to GSS operatives' violation of rules and directives have so far been imposed as an internal procedure within the GSS,

such as transfer of the delinquent to another unit, up to dismissal from the Service. The Special Disciplinary Tribunal sometimes showed leniency in imposing disciplinary sanctions despite the gravity of the offense. This probably accounts for the fact that informal disciplinary measures were preferred to recourse to the Disciplinary Tribunal. We consider that in cases of special gravity where there are grounds for a criminal charge, a GSS member – or in our case an investigator – cannot enjoy de facto immunity from criminal proceedings.

(b) We received a memorandum from the Attorney General with a proposal for examining complaints against investigators by a special unit, to be established in the Justice Ministry for implementing the recommendations of the Eitan-Sirota Committee, on the subject of investgating complaints against police personnel. We requested the reaction of the GSS Chief to this proposal, and it was submitted. It contains a counterproposal which seems to us to be constructive and reasonable, in assuring an appropriate balance between the proper status of the Attorney General and the State Attorney in examining complaints against GSS investigators, and the legitimate needs of the GSS. We endorse the GSS position, details of which we state in Part Two of this Report.

(c) The GSS is a State institution, within Sec. 9(2) of the State Comptroller Law, 1958, subject to control by the State Comptroller. We heard that till now control by the State Comptroller has been limited to matters of administration, finance, etc. of the GSS, but has refrained from examining the operational activity of the GSS, including the activity of the investigators' unit. We see no justification for this limitation. We recommend that the State Comptroller also conduct an examination of the activities of the GSS investigators' unit. Our intention is not that it should go into specific complaints of persons under investigation or on their behalf; rather, its examination will relate to the regularity of investigations in accordance with the law and with the guidelines laid down according to law. For this purpose, the Comptroller's staff will have free access to all the premises of the investigators' unit, and will also be able to perform sample examinations on the way in which investigations are conducted. It will also be able to examine

the physical condition of the investigation and detention premises used by the investigators' unit.

The activity of the control unit itself must be conducted confidentially and with strict separation from the general functions of the State Comptroller. The control unit's reports will be submitted to a special subcommittee of the Knesset's State Comptroller Committee, the discussions of which will be assured full confidentiality.

(d) The person in charge of the GSS in the political echelon is, as noted, the Prime Minister. Meetings are held between the GSS Chief and the Prime Minister at stated times, at which the GSS Chief reports to the Prime Minister about matters of special importance and answers the Prime Minister's questions on matters related to GSS activities. In the nature of things, and due to his numerous tasks, the Prime Minister cannot go deeply into everything happening within the GSS, even in general terms. He therefore needs to be assisted by a team which will be able to sift through the more detailed material brought to him by the GSS, and direct the attention of the Prime Minister to any occurrence or development worthy of his consideration. We see no point in arguing with those who disagree with the need for appointing a special adviser to the Prime Minister on intelligence matters – which the Sharet-Yadin Commission recommended in its time, with the Agranat Commission reiterating this recommendation. We are willing to endorse the recommendation of another Commission which recently submitted its report, "that the authorities of the Military Secretary (to the Prime Minister) and his staff should be expanded, to include" –

> "...
>
> (bb) to receive reports, at his request, in addition to reports submitted to the Prime Minister by the GSS Chief;
>
> (cc) to receive information from the Heads (of GSS units), with the knowledge of the GSS Chief."

Consequently, these powers will also apply to what occurs in the GSS investigators' unit.

In addition, we favour the recommendation of the same Commission, in reference to the GSS as follow:

> "The Prime Minister will establish a small Ministerial Committee, which will deal with special exceptional cases and with subjects which the Prime Minister will bring before it."

We were told that this Ministerial Committee has not yet been established. In our opinion it should be established, with a limited personal composition. On the subject of methods of investigation of HTA, it will fulfil the role of reconsidering the code of measures for applying pressure permitted in GSS investigations of HTA. The annual report of the investigators' unit will also be brought before it. The Military Secretary, who will coordinate the deliberations of the ministerial committee, will also bring before it his comments, if any, about the investigators unit's activity, in addition to his report to the Prime Minister.

(e) In addition to this control at the ministerial echelon, the conclusions of the Ministerial Committee's deliberations will be brough to the attention of the Subcommittee for the Services of the Knesset's Foreign Affairs and Defence Committee. The annual report of the investigators' unit will also be brought before it. For the purpose of proper parliamentary supervision, this Subcommittee will also be able to discuss any matter related to GSS investigations of HTA, as it deems appropriate.

Legal Proceedings for past Actions of GSS Investigators and Testimony given by them in this respect

4.20 We are now reaching the serious problems involved in legal proceedings that may be openend against GSS investigators, due to acts of employing pressure performed by them during the course of an investigation of persons suspected of HTA, and due to false testimony they gave in this regard before a Court or a Tribunal. In reference to acts of physical or psychological pressure employed by them: Prima facie these included criminal offences of assault, blackmail and threats (see above in para 3.4). But it seems to us that, as long as these acts did not deviate from the

guidelines which existed in the GSS at the time of the investigation (and they usually did not deviate from those guidelines), the investigator who performed the acts will be able to plead justification under sec. 24(a)(1) of the Penal Code, since the investigator complied with the order of his superiors, and this order was not manifestly illegal, because there were grounds for the investigator's belief that he was thus acting in order to obtain vital information about the activities of the terrorist organization to which the person under investigation was suspected of belonging. The investigator can also rely on the defence of necessity, according to sec. 22 of the Penal Code, as we have interpreted it above.

4.21 The investigator can raise similar pleas in his defense in an action in tort for damages, if such an action is brought against him for assault, under sec. 23(1) of the Civil Wrongs Ordinance (New Version). To such an action there is perhaps a defence in accordance with sec. 24(1) of the Ordinance, which is similar to a certain extent to the defence of necessity under sec. 22 of the Penal Code, although sec. 24(1) is less broadly worded. In any event, the prevailing view is that even though a general defence of necessity is not expressly provided for in the Civil Wrongs Ordinance, it can be inferred from the condition included in the definition of several civil wrongs, that the action is done "unlawfully" or "without reasonable cause" (see the discussion of this topic in Tedeschi and others, Civil Wrongs, paras. 160-164, p. 294 ff).

We did not see fit to enter into the question whether a cause of action in tort exists for a person harmed by false testimony given against him.

4.22 Graver is the problem of criminal complaints expected from persons interrogated by GSS investigators, in which the investigator later on gave false testimony to the Court or a Tribunal on his interrogation methods. Here the investigator cannot rely on the defence of necessity under sec. 22, or of obedience to the orders of his superiors under sec. 24(a)(1), since perjury is a grave criminal offense and manifestly illegal, above which flies the black flag saying "Forbidden." Nevertheless, after considerable soul-searching, we decided to propose that criminal proceedings be not brought in that respect against these investigators, for the following reasons:

4.23 The investigators' motive was not a selfish one of obtaining personal benefits, but the belief – though an entirely inadmissible belief – that by such behaviour, too, they were serving the public. In fact, they did much in their devoted work in order to assure the public's wellbeing and peaceful existence. They were trained to maintain strictly the compartmentalization of the directives given to them by their superiors, which defined the means of pressure they were permitted to employ. As a result of a distorted attitude towards strict discipline, they saw no choice but to give false testimony in order to to maintain this compartmentalization.

Perhaps all these considerations were not sufficient to prevent the full application of the law's sanctions for such a grave offense. But to this another reason has to be added, which we view as decisive:

We did not succeed in obtaining precise statistical data on the number of "trials within the trial" in which GSS investigators appeared since 1971, and we do not know in how many of these trials perjury was committed by investigators. In our estimate, there could be a considerable number of these. There will certainly be many of those interrogated and put on trial at the time, who will seek to take advantage of this possibility to harass their investigators. Bringing criminal proceedings against investigators, even in part of these cases, is liable to cause a far-reaching upheaval among their ranks – and beyond that, in the entire GSS – and cause serious damage to the GSS' ability to function efficiently in foiling HTA. We have to take into account that a majority of the investigators against whom criminal complaints are likely to be submitted, are still serving in the GSS, among them some who today hold senior posts. This is a small and closely-knit group of individuals, possessing great skills acquired over the years. Replacements for them cannot be found easily or overnight. But the activities of the Investigation Unit must continue ceaselessly, day after day. We have already mentioned that also recently while this Commission of Inquiry was conducting its proceedings, this unit put to its credit several important successes, in uncovering terrorist groups that in the past committed murder and would have continued in their criminal activities, if it were not for their discovery. We believe that today the desire of these investigators – on all levels – to learn the lessons of the past is intense. It will be better to enable

them to concentrate on performing their vital service to the public. Perhaps this is required less for their own good than for that of the public. On the personal level, too, the wounds should be healed rather than applying surgery by removing a living organ from the GSS body, with results the seriousness of which cannot be foreseen. We could not reconcile ourselves to the thought that if we recommend a response of "fiat iustitia, ruat coelum," it is liable to paralyze GSS investigations and thus it is almost certain that victims would die needlessly in terrorist activities that the GSS is capable of foiling.

4.24 The way that we recommend in order to attain this goal was outlined in a Report made in 1963 by a Commission of Jurists headed by Justice Agranat, which defines the authority of the Attorney General as against that of the Minister of Justice. In its Report, which today is considered a basic constitutional document, the Commission discusses the exercise of the Attorney General's function, especially in criminal matters, and in para. 5 (p. 12) it replies to the question whether "(the Attorney General) must or should consult with the Minister of Justice on [the execise of his functions in criminal matters], particularly in matters of security, political or public importance." Its reply:

> "(a) The Attorney General must consult with the Minister of Justice from time to time, on the exercise of his functions in criminal matters.
>
> "(b) He is especially under such obligation – and occasionally, also, under the obligation of consulting with the entire Government – with regard to activities of a kind which carry security, political or public significance.
>
> "(c) In cases where differences of opinion arise between the two (or between the Attorney General and the Government), the final decision lies with the Attorney General."

Further on the Commission of Jurists states in explanation (p. 13; as quoted by Justice Barak in his minority opinion (p. 608) in H.C. 428/86 et al. 40(1) Piskei Din 505, about the pardons granted in the No. 300 bus affair):

"The above duty of consultation applies particularly to penal action in a matter which carries security, political or public importance. In such a case, it is incumbent on the Attorney General to consider always, lest the institution (or stay) of criminal proceedings cause more damage to interests of the State than desisting from such action. He will be able to do so only after he acquires information and advice from those who are entrusted with the primary responsibility to make sure that security, political or public interests of the State are not harmed – from those who, he must assume, are more experienced and familar with these fields than he is. As mentioned, he should generally approach the Minister of Justice to receive the information and advice that he requires, but sometimes – that is, in cases in which a question of 'high policy' arises – there will be no choice but to approach the entire Government for advice."

Further on, the Jurists note that this is also the English viewpoint – that when the public good is liable to clash with the strict exercise of the Attorney General's authority, it is not only his right, but his obligation, to consult with the (English) Cabinet.

4.25 These words were written in 1963, before the enactment of the Criminal Procedure Law, 1965, but essentially, the situation did not change also after its enactment: According to sec. 11 of the Law (in its consolidated version of 1982), in Israel the Attorney General prosecutes in criminal trials, and as such he is empowered to instruct the other authorities dealing with such matters. Sec. 58 provides that the Police must deal with the investigation, for the purpose of gathering material towards the institution of criminal proceedings, and according to Sec. 60, material obtained in the investigation will be transferred by the Police to the District Attorney who, according to sec. 62, may not prosecute "if he believes that the trial is not of public interest". The complainant has the right to appeal against such a decision before the Attorney General, as stated in sec. 64.

4.26 According to these provisions, the Attorney General has, in our opinion, power to instruct the Police that every complaint against a GSS investigator about perjury in a trial regarding the methods of investigation

employed by the GSS against those investigated by it (including the use of illegal pressure in the investigation) will be transferred from the outset to the Attorney General, so that he may decide if the trial is in the public interest. For the reasons we have explained, we are of opinion that not only is the conduct of such a trial (and a police investigation with the end of bringing about the institution of such a trial) not in the public interest, but to the contrary: conducting such a trial would harm the public, by weakening its defences against acts of terrorism, due to the damage done to the functioning of the GSS in its work to thwart actions of this kind. Because such a decision is likely to constitute a precedent for similar complaints which might be made against investigators, – and, as stated, this concerns the question of the proper functioning of the GSS in HTA investigations, which clearly involves consideration of the public good – we presume that the Attorney General will see fit to consult with the Government on this question. If he does so, our recommendation to the Government is to state it as its opinion that decisive considerations concerning the public good require the stay of such criminal proceedings already at the initial stages of the Police investigation. Afterwards, the final decision on the matter will lie with the Attorney General.

Since this is our recommendation regarding GSS personnel who are still continuing their work in the GSS, we see no reason for discriminating in this respect between those men and those who no longer work in the GSS.

4.27 For the same reasons of the public good, we abstain from submitting a recommendation for drawing personal disciplinary conclusions on this matter against those officials continuing to work in the GSS.

4.28 Needless to say, what is stated here will apply only to what occurred in the past, in trials conducted until the Prosecution made its admissions in the Appeal in the Nafsu case in the Supreme Court.

4.29 Since we did not make a recommendation regarding any of the GSS personnel, there were, in our opinion, no grounds for applying the provisions of sec. 15 of the Commissions of Inquiry Law, 1968.

4.30 Another problem, distinct from the previous one, is what is to be done

about applications for retrials by persons claiming to have been convicted unlawfully on the basis of a confession admitted as evidence in a trial on a charge of HTA, and that it was unlawfully admitted due to the application of illegal pressure, with this fact having been concealed from the Court through perjury on the part of a GSS investigator or investigators. The right to make such an application should certainly not be taken away from one who was thus convicted, particularly when he is still serving a term of imprisonment under a sentence passed in the proceedings in regard to which the retrial is applied for.

In this respect the applicant cannot rely on a plea of perjury, according to sec. 31(a)(1) of the Courts Law (Consolidated Version), 1984, (or according to Sec. 445(1), or Sec. 440H of the Military Justice Law, 1955), if our recommendation is accepted to prevent the holding of criminal trials for perjured testimony in cases of this kind. But the applicant may still base his application for a retrial on a plea of discovery of new facts, according to sec. 31(a)(2), of the Courts Law, i.e. the fact revealed in our Commission's inquiry, that there was a practice of investigators giving false testimony in the trials of those accused of HTA, when they thought they had no choice but to do so. If such an application is made, it will be transferred in the normal way to the Attorney General for his opinion, in accordance with regulation 2(c) of the Court Regulations (Procedure in Retrial), 1957. Afterwards, the President of the Supreme Court will have to decide if the conditions for holding a retrial have been fulfilled, as stated in sec. 31 of the Law.

It is to be assumed that most of the trials in which false testimony was given concerning methods of investigation were held before the Military Courts in the territories. Regarding these, we have not found, in the Order on Security Provisions, any provision for holding retrials after the confirmation of the judgment according to sec. 41 of the Order. Under sec. 44, the Commander is only empowered to pardon the person convicted, or to reduce his sentence. In our opinion, justice requires not to deprive persons convicted, in the territories as well, of the possibility of having the conviction set aside, when the accused would not have been convicted, had it not been for false testimony against him. Accordingly, we recommend to amend the Order by adding to it relief by way of a retrial, by order of the Regional Commander.

Such provisions may include reference by the Regional Commander to the Military Advocate General, who will render his opinion to him, and the conduct of an examination or preliminary inquiry toward the rendering of that opinion, on the lines of Sec. 448(b) and 449 of the Military Justice Law. The examination or inquiry may be held by an advisory board, headed by a military judge of legal standing.

4.31 If the conviction is set aside following such retrial, the person who was convicted groundlessly will be able to sue the State treasury of the cost of his defence and for compensation for his detention or arrest due to the accusation of which he was eventually acquitted, as stated in sec. 80 of the Penal Code, 1977.

Legal Adviser to the GSS

4.32 The GSS presently operates without a legal adviser to fill the regular position of Head of the legal advisory unit. As soon as possible, an outstanding lawyer should be appointed to this important position. One of the first tasks of the Legal Adviser to the GSS after his appointment will be to act in order to alleviate the friction which was apparently created between the GSS and the military and civil Prosecution, due to the crisis of confidence which must now be overcome for the sake of the common goals of these State authorities.

In conclusion, the Commission would like to express its utmost appreciation to its coordinator, Judge Alon Gillon, for the vital assistance he extended to it at all stages of its work, with examplary and prudent devotion and efficiency. Also, the Commission owes thanks to its administrative staff, which was small in number but excellent in performing its tasks, and to the security personnel who guarded the Commission in the best possible manner.

Attached to this report is an appendix detailing the financial expenses of the Commission.

We decide, under regulation 8(c) of the Commissions of Inquiry (Procedure) Regulations, 1969, that the record of the Commission's proceedings is to be deposited in the State Archives, and the right to peruse it, once it is so deposited will be given to those authorized to do so by a joint decision of the Prime Minister and the Chairman of the Knesset's Foreign Affairs and Defence Committee.

Jerusalem, 30.10.87.

(–) Moshe Landau	**(–) Ya'akov Malz**	**(–) Yitzhak Hofi**
Chairman of the Commission	Member of the Commission	Member of the Commission

מבקר המדינה

תמצית מדוח הביקורת

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מבקרת המדינה גב' מרים בן-פורת, הגישה ב-1995, לתת-הוועדה לענייני קהיליית המודיעין של הוועדה לענייני ביקורת המדינה של הכנסת, דוח על ביקורת שנערכה בנושא מערך החקירות בשירות הביטחון הכללי (שב"כ) לשנים 1988-1992.

בשנת 1997 החליטה הוועדה לענייני ביקורת המדינה, לאחר התייעצות עם מבקרת המדינה דאז, כי בשים לב לצורך לשמור על ביטחון המדינה, לא יונח הדוח על שולחן הכנסת ויישאר חסוי. עוד החליטה הוועדה באותו מועד, שלא לפרסם גם את תמצית הדוח, בנוסח שהמליצה לפרסם מבקרת המדינה דאז.

בעקבות החלטת בית המשפט הגבוה לצדק, בבג"צ 607/98 מיום 11.11.99, להמליץ בפני הוועדה לענייני ביקורת המדינה, להביא לבחינה מחודשת את החלטתה הקודמת של הוועדה משנת 1997, החליטה תת-הוועדה ביום 6.2.2000, בהתאם לסמכותה בחוק מבקר המדינה, ולאחר התייעצות עם מבקר המדינה, להתיר להניח על שולחן הכנסת אותה תמצית דוח, זאת בהתחשב בשינוי בנסיבות מאז החלטתה הקודמת.

הדוח המפורסם בזה הינו, אפוא, התמצית שהותרה לפרסום מן הדוח בנושא מערך החקירות בשירות הביטחון הכללי (שב"כ) לשנים 1988-1992.

תמצית הדוח

הדוח על החקירות בשב"כ נשען על שני מקורות: א. בדיקת משרד מבקר המדינה את פעילותה המיוחדת של קהילת המודיעין העמיקה בשנים האחרונות, במאמץ למצות במלואו את תפקיד העין הציבורית למתהווה בגופים המבוקרים, גם כאשר הטיפול הוא חשאי; ב. דוח ועדת לנדוי (להלן – דוח לנדוי) לעניין שיטות החקירה של שב"כ בנושאי פח"ע, מאוקטובר 1987, הכולל, בין היתר, המלצה שמשרד מבקר המדינה יבדוק אם יחידת החקירות בשירות מנהלת חקירות תקינות בהתאם לדין ולהנחיות שניתנו כדין. בדוח לנדוי פורסמו המלצות גם לגבי הנהלים לחקירות פח"ע, לרבות קובץ הנחיות לחוקר השירות, המפרט את אמצעי הלחץ שמותר להפעיל בעת החקירה, וכאשר יש צורך בהיתר – כל אמצעי והדרג המוסמך להתירו.

בתקופה מספטמבר 1991 עד דצמבר 1992 ערך משרד מבקר המדינה ביקורת על חקירות פח"ע בשב"כ. הביקורת עסקה ביעדים ובדרכי הפעולה של מערך חקירות הפח"ע בשב"כ ובהגדרתם; בגורמים המשפיעים על תפקוד החוקרים ועל הישגיהם; בתקינות החקירות לפי הדין ולפי ההנחיות; בסדרי הדיווח ובאמינותו ובאכיפת כללי התנהגות על חוקרים. הביקורת נערכה בשב"כ; בדיקות השלמה בוצעו במשרד ראש הממשלה (רוה"מ), במשרד הביטחון, במשרד המשפטים, בפרקליטות הצבאית, במשטרת ישראל ובשב"ס.

הדוח עוסק בנושאים העיקריים הקשורים לתהליך החקירות המבוצעות על ידי חוקרי השב"כ, אך אינו מקיף את כולם. בעיקרו עוסק הדוח בתקופה שמסוף 1987 ועד קיץ 1992. הגשת הדוח רק בשלהי 1994 היא תוצאה של העבודה הרבה שהושקעה בהכנתו, בעיבודו ובבחינתו, ושל תהליך גיבוש והגשת תשובות המבוקרים למשרד מבקר המדינה שנמשך זמן רב. נבחנה חזור ובחון חריפות המסקנות אל מול ההערכה הרבה למסירותם ולהישגיהם של העוסקים במלאכת השב"כ בכלל ובחקירות בפרט, בעיקר בשנות האינתיפאדה, שנים שבהן האלימות בשטחים גאתה והטרור התעצם; חלק מרכזי ממטלת ההתמודדות עם הטרור היה מוטל אז, ומוטל כיום, על השב"כ.

פעילות חוקרי השב"כ נבחנה אל מול מערכת הנורמות המחייבת אותם: בראש ובראשונה – הדין, כולל ההלכה הפסוקה של בית המשפט העליון שהיא חלק מן הדין;

המלצות ועדת לנדוי, החלטות ועדת השרים לענייני החקירות בשב"כ (להלן – ועדת השרים), וכן נוהלי השב"כ עצמו והוראותיו.

הדוח מוקדש ברובו לשאלה באיזו מידה תאמה פעילות השירות, במלאכת החקירה, את הנורמות הללו, ומה מידת החומרה שיש לייחס לתופעות של סטייה מנורמות אלה ושל הפרתן. הדוח בודק חלק מתנאי העבודה הפיזיים במיתקני החקירות, את הקשיים שיוצרים העומס והמתח בעבודה ואת הנחלת נוהל היתרים בחקירה לחוקרים. הדוח מקפיד במיוחד להדגיש את הצורך לקיים ככתבם וכרוחם את שלושת הכללים הבאים:

א. החקירה היא, ביסודו של דבר, תהליך של התמודדות אינטלקטואלית. אמצעי לחץ, אם הם נדרשים בחקירה, יופעלו אך לפי כללים שנקבעו כדין ורק באישור הנדרש.

ב. הדיווח על פעולות החקירה ותיעודו חייבים להיות מלאים.

ג. אין בשב"כ מקום לדיווח שקר, לא בתוכו ולא כלפי מי שממונה עליו וכלפי רשויות המשפט ורשויות חקירה ובדיקה אחרות.

בכל הנוגע לצורך בהקפדה על שלושת הכללים דלעיל חשפה הביקורת ליקויים, בהם גם חמורים. לכן בא הדוח לקבוע את הצורך להשתית את פעולות השב"כ על הדין ועל הוראות שניתנו כדין.

בביקורת נבחנו בעיקר הארועים שהתרחשו במתקן החקירות בעזה, כמדגימים את מצב הדברים שנוצר בארבע השנים שאחרי פרסום דוח לנדוי. הבחינה הראתה, כי לכל דרגי הפיקוד והמטה חלק במצב זה: העלתה מסכת כשלים המלמדת שמי שאחראים על הארגון כולו נכשלו קשות בתפקידם לקיים את פעולת השב"כ במסגרת החוק.

מאז ינואר 1988, סמוך למועד פרוץ האינתיפאדה (דצמבר 1987) ועד סוף התקופה שנבדקה בביקורת, דצמבר 1992, אירעו בשטחי יהודה שומרון וחבל עזה ובתחומי "הקו הירוק" 19,775 פיגועי פח"ע,[1] בהם: כ-2,000 מקרי ירי והנחת מטעני חבלה; יותר מ-7,000 מקרי השלכה של בקבוקי תבערה ורימונים; יותר מ-5,000 מקרי

[1] פיגוע פח"ע: מעשה הגורם לפגיעה פיזית, או ניסיון לפגיעה פיזית, באדם או ברכוש, הנעשים ממניעים לאומניים, דתיים, מדיניים או רעיוניים.

תקיפה, בכללם יותר מ-500 מקרי דקירה; יותר מ-4,000 מקרי הצתה; וכ-900 מקרי חבלה ברכוש.

בפיגועים אלה נהרגו 123 אזרחים ישראלים, 799 ערביי השטחים ושלושה תיירים, ונפצעו 671 אזרחים ישראלים, 2,168 ערביי השטחים ו-23 תיירים.

בסך הכל נעצרו בתקופה האמורה אלפי אנשים במעצר מינהלי, עשרות אלפים במיתקני הפרות סדר של צה"ל וכמה אלפים במיתקני חקירות של שב"כ. רוב הנחקרים על ידי שב"כ הודו בחקירתם לפחות בחלק מהעבירות שבביצוען נחשדו; מיעוטם נוקו מכל חשד.

למערך החוקרים הישגים חשובים במאבק בפעילות החבלנית ובחתרנות מדינית בישראל ובשטחים: באיסוף מודיעין, בגיוס סוכנים, בפיענוח פיגועים, בהבאת מחבלים לדין, בחשיפת התארגנויות ובהסגרת אמל"ח. מערך החוקרים עמד במבחנים קשים ובסיכונים ניכרים שתפקידו הציב בפניו; עבודתו כרוכה במתח ובלחץ התובעים את מירב תעצומות הנפש. זו עבודת קודש הנעשית ללא לאות, במסירות נפש, בסיכון עצמי, ולעתים בתנאים לא תנאים, הכל בתחושת ייעוד ושלא על מנת לקבל פרס.

כתוצאה מהחקירות שבוצעו בשנים אלה פוענחו בתקופה הנדונה אלפי פיגועים; נחשפו אלפי התארגנויות פח"ע, והוסגרו מאות רבות של פריטי אמל"ח שונים – מנק"ל ורימונים ועד מוקשים ומטעני חבלה. ככלל, כאשר הנחקר מודה בעבירה המיוחסת לו, או שיש מספיק ראיות מפי עדים אחרים, מועבר תיקו של הנחקר לתביעה הצבאית לשם הכנת כתב אישור והעמדה לדין.

האינתיפאדה חוללה שינוי מהותי בתנאי פעולתו של מערך החוקרים:

א. מספר הנחקרים עלה בהתמדה והגיע לשיעורים שכמותם לא היו בעבר.

ב. עלה במידה רבה מספר הנחקרים שהם בעלי נחישות אידיאולוגית ומוטיבציה לעמידה בחקירה.

ג. המיחזור המהיר של נחקרים – שחזרו לפעילות חבלנית – הביא לתיחכום הארגונים, להכרת חלק משיטות החקירה ומגבלותיהן ולגיבוש דרכי פעולה כיצד

ד. לעמוד בחקירה. תופעה זו, המוכרת עוד מהתקופה שקדמה לאינתיפאדה, גברה לאין ערוך במהלכה.

ה. בתקופת הביקורת מספר החוקרים ושטחם של מתקני החקירה לא הותאמו לקצב הגידול במספר הנחקרים.

ו. לחץ הארועים החבלניים חייב מתן פתרונות מהירים – כדי לספק מידע מודיעיני שיאפשר טיפול במבצעי פח״ע וסיכול כוונות לפיגועים שטרם יצאו מהכוח אל הפועל. מערך החוקרים הועמד, אפוא, בלחץ זמן – מצב המקשה על ניהול חקירה סדורה ויסודית ומהווה פיתוי עז לסטות מכללים מותרים כדי להשיג תוצאות מהירות.

השב״כ הצביע בפני משרד מבקר המדינה על גורמי-קושי נוספים שהכבידו על עבודת החוקרים בתקופת האינתיפאדה:

א. התרבו עיסקות טיעון, שבעקבותיהן הוטלו תקופות מאסר קצרות.

ב. עקב מיגבלות של כוחות הביטחון, עלה מספר המקרים של דחיית מעצר חשודים לצורכי חקירה, של ניוד נחקרים בין מיתקני כליאה לשם קידום חקירתם, של גביית עדויות נחקרים על ידי שוטרים בתום חקירתם על ידי שב״כ ועל יסודה, ושל העברת נחקרים ממיתקני שב״כ למיתקני שירות בתי הסוהר (שב״ס) בתום חקירתם.

אמנם, מערך החוקרים פעל במסגרת אילוצים קשים. אך ועדת לנדוי הביאה בכלל חשבון קשיים בחקירה, והתמודדה עם בעיה זו. היא קבעה איך על השב״כ לנהוג במקרים כאלה ואף קבעה לעניין זה הנחיות בכתב. אולם מהביקורת עולה, כי חרף כל אלה נמשך במתקן החקירות של שב״כ בעזה, ובקנה מידה רחב, ביצוען של חריגות מקביעותיה של ועדת לנדוי ומנוהלי השב״כ. גם במיתקנים אחרים היו חריגות, במידה מסוימת.

החריגות לא נבעו בעיקרן מאי-ידיעת גבולות המותר והאסור אלא בוצעו ביודעין. חוקרים ותיקים, ואף בכירים, במיתקן בעזה, ביצעו חריגות קשות ושיטתיות. בתקופת

הביקורת מנהלים בכירים בשב"כ לא מנעו את החריגות בין בהתירם אמצעים ודרכי לחץ, במסגרת נוהלי השב"כ, על אף שאינם מופיעים בקובץ שחיברה ועדת לנדוי, בין בהסירם סייגים שבהם סייגה ועדת לנדוי את השימוש בהיתרים, ובין בהימנעותם מביעור הנגע, כמתחייב מתפקידם.

גם אחרי פרסום דוח ועדת לנדוי לא נעקרה התופעה של אמירת שקר מקרב החוקרים: היו ביניהם ששיקרו בעת מתן עדות בפני ערכאות שיפוטיות או רשויות חקירה ובדיקה אחרות, והיו ששיקרו בדיווחים לממונים ולאחרים בתוך השב"כ עצמו. קביעת בכירי השב"כ בפני ועדת לנדוי כאילו בתוך כותלי השב"כ הייתה הקפדה נוקשה ביותר על אמירת אמת, בבחינת "ייהרג ובל יעבור", נבדקה על ידי משרד מבקר המדינה ונמצאה חסרת בסיס במציאות.

אין זה מסמכותה או מתפקידה של מבקרת המדינה לקבוע אם רצוי וצריך לשנות את אמצעי החקירה כדי להתאימם למצב שהישתנה מאד מאז ועדת לנדוי. קיומו של צורך זה הוא עניין הנתון בידי הגורמים המוסמכים, או בידי הרשות המחוקקת. מצב שבו נדרש השב"כ להשיג תוצאות בחקירות פח"ע ובמהירות, בשעה שלפי הכללים הקיימים מטרה זו קשה מאוד, ולעתים אף בלתי אפשרית להשגה, הוא מצב שאינו בריא, הטומן בחובו דבר והיפוכו. היה זה לגיטימי אילו הבהירו ראשי השב"כ את הבעיה ודרשו את פתרונה בשינוי כללים ונהלים, או על דרך החקיקה. אולם כל עוד לא עשו כן, חייבים היו לדבוק בכללים, יהיו התוצאות אשר יהיו, לרבות ירידה בסיכול. אולם מטה השב"כ בחר בדרך לא דרך: הוא לא פנה לוועדת השרים כדי להביא לשינויים בכללים מחמת אי התאמתם לצורכי החקירות או כדי שתתקבל חקיקה מתאימה. בה בעת נמשכו החריגות במתקני החקירות מבלי שהמטה – שידע עליהן או שהיה חייב לדעת עליהן – יפעל למניעתן. נוצרה, אפוא, השלמה בפועל עם החריגות מהמותר בעת החקירה.

את המסר מנחילים בכירי השב"כ לא רק במילים – שהן חשובות בפני עצמן – אלא, בעיקר, בהתנהגות בחיי היומיום ובאירועים מיוחדים. לגבי החריגות בחקירה נהג בשב"כ מסר כפול שכשמו כן הוא: שני מסרים רווחים זה לצד זה וניתן – אם רוצים בכך – לנהוג על פי מסר אחד ולהתהדר בשני. מדוח ביקורת זה ניבט קיומו של מסר

כפול בשרות, הן בעניין חריגות מהיתרים והן בעניין אי-ההיצמדות לדיווח אמת כנכס צאן ברזל. יש בו דוגמאות של התעלמות מחריגות מהיתרים והתפשרות אתן, ושל אי-מיצוי חומרת הדין עם חוקרים שחרגו ועם חוקרים ששיקרו.

האפשרות הכמעט יחידה לעקוב באופן מלא אחר המתרחש במיתקני החקירות היא באמצעות תיעוד נאמן של מהלכי חקירות ובפרט של ההיתרים להפעלת אמצעי לחץ. על השב"כ לפעול נמרצות כדי להבטיח שיקוף מלא, אמיתי ומדויק של מהלכי חקירות ושל היתרים, כדי שיהיה זמין בכל עת למי שהוסמך להידרש אל הפרטים: יהיו אלה ערכאות שיפוטיות, גופי ביקורת ובקרה חיצוניים או פנימיים, גופי תורה והדרכה של השב"כ (לצורך הפקת לקחים ולימוד) או דרגי פיקוד.

מאחר שהשימוש באמצעי לחץ בחקירת פח"ע הותר, בנסיבות מסויימות, על ידי ועדת לנדוי, היה על השב"כ לבטא זאת בכל העזרים התורתיים וההדרכתיים המכוונים לחוקרים, הן בהקשר הערכי-נורמטיבי והן בהקשר המעשי-טכני. בדרך זו היו מנחילים לחוקרים הבנה יסודית של עצם הנחיצות בשימוש כזה ושל גבולותיו; ומצד שני – היה הדבר תורם להפעלה יותר נכונה ומדויקת. משרד מבקר המדינה מצא כי בתקופת הביקורת השב"כ לא השקיע די הצורך בהדרכה ממוסדת של תורת החקירה ונהליה.

המשאבים שיוקצו למערך החוקרים – כוח אדם, מיתקני חקירה לסוגיהם ולמרכיביהם השונים ואמצעים אחרים, וכן משאבים שיוקצו לשב"ס – כוח אדם ומיתקני כליאה לקליטת מסיימי חקירה – צריכים להיקבע נוכח יעדי הביצוע של שב"כ, ולהיות מותאמים להם בכמות ובאיכות. כל גידול באיזה מהמשאבים צריך שיהיה מלווה בגידול מתאים בשאר המשאבים הרלבנטיים, כמתחייב מהפעלתם המשולבת במסגרת המלחמה בפח"ע. על ידי כך יוכל השב"כ לנסות להתגבר על תור מיועדי החקירה ועל תנאי הצפיפות במיתקני החקירות.

בשנים שבהן נערכה הביקורת בוצעו גם תיקונים בעניינים שנבדקו. הרי העיקריים שבהם: עודכנו נהלים; הוגברו הבקרה והפיקוח; נבחנו מחדש "ההיתרים בחקירה" ונוסחו מחדש התנאים להפעלתם; נחקרו ונחשפו חריגות חוקרים וננקטו אמצעי עונשין של חריגות. מהלכים אלה נעשו על ידי השב"כ בסיוע פרקליטות המדינה

וגורמים נוספים במשרד המשפטים, ובתמיכת שר המשפטים; גורמים אלה נעזו מצדם בהחלטותיה של ועדת השרים. זאת ועוד, בתשובה למשרד מבקר המדינה על טיוטת ממצאי הביקורת, הודיע השב"כ שחלק מהליקויים שפורטו בדוח כבר תוקנו. יחד עם זאת, מצטרף משרד מבקר המדינה לדברי פרקליטת המדינה בתשובתה לדוח הביקורת, כי "עדיין רבה המלאכה שנותרה" וכי "יש לשקוד על תיקון ליקויים רבים נוספים".

על השב"כ מוטלת האחריות לסיכול פעילות עויינת. זה אמנם יעד נכסף, אך בלתי ניתן להשגה. יחד עם זאת ברור שהשב"כ תורם רבות וכך מתקרב כיברת דרך נכבדה לקראת יעד זה. בתשובתו למשרד מבקר המדינה מנובמבר 1993 הודיע מזכיר הממשלה, כי הצעת משרד מבקר המדינה לחזור ולדון בהגדרה של משימת השב"כ במלחמה בפח"ע ראוייה להישקל, וזאת, לדבריו, בפרט נוכח הנסיבות החדשות סביב ההסכם עם הפלסטינאים.

אמצעי הלחץ בחקירה שהתירה ועדת לנדוי צריכים להיבחן תדיר על ידי ועדת השרים. מצד אחד, יש הגורסים שאפילו את האמצעים שהותרו, או שניתן להתיר, לפי דוח ועדת לנדוי, יש למתן; אך מצד שני, יש הסבורים כי המציאות העכורה דורשת הרחבת ההיתרים כדי להשיג תוצאות חיוניות. ניתן לקבוע, כי המציאות שמאז פרוץ האינתיפאדה ועד הטרור חסר המעצורים שאנו עדים לו במועד הוצאת דוח זה – שונה מהותית מזו שעמדה לנגד עיניה של ועדת לנדוי. על ועדת השרים להביא בחשבון שיקוליה מציאות זו, וכן את הלקחים מהפעלת אמצעי הלחץ על ידי השב"כ. יש לבחון את האמצעים מבחינת דרישותיה של דמוקרטיה מתוקנת לשמירת כבוד האדם, מצד אחד, ומבחינת הצורך להגן על עצם קיומה, מצד שני.

ועדת לנדוי ישבה על מדוכת החקירות בשב"כ בקיץ 1987, לאחר שהתברר כי חלה סטייה מהותית בדרכי עבודת השב"כ. התפקיד המיוחד המוטל על השב"כ, שלעתים מחייב אותו לפעול בשטח האפור, מבחינת השיטה והתוכן, לא רק שאינו מפחית אלא אף מגביר את הצורך שהפעולות יושתתו על בסיס חוקי. מאחר שעקרון יסוד זה נפגע, באה ועדת לנדוי וקבעה כיצד פעילות השב"כ בתחום החקירות צריכה להתנהל. נקבע גם איך, מתי ובאיזו שיטה מותר לחרוג, בנסיבות מסוימות, מהעקרון שאסור שחקירה תהיה מלווה בלחץ פיזי. לכאורה, המשבר שהוליד את הצורך בהקמת הוועדה

הממלכתית, אשר מסקנותיה והמלצותיה אושרו על ידי הממשלה, צריך היה להוביל להקפדה מלאה על הכללים שנקבעו. ממצאיו העיקריים של דוח זה מגלים שלא כך קרה, וכי לפחות בחלק ניכר מהתקופה שנבחנה בדוח זה נמשכו התופעות השליליות, כגון: זלזול בחוק, דיווח חסר או כוזב ועוד.

מה שחסר היה וחיוני שיהיה, הוא עמדה נחרצת של ראשי השב"כ למלא, בעת ביצוע המטלות, אחר הוראות החוק וההחלטות המוסמכות המושתתות עליו; אין חולק שמטלות השב"כ הן חשובות וראויות, וכי הן מבוצעות במסירות רבה. אולם אין בכל אלה כדי להצדיק סטייה מחוק, מהחלטות מוסמכות ומכללים שנקבעו בוועדת לנדוי ובוועדת השרים, ולו גם למען המטרה החיונית של תוצאות מהירות בחקירה; מדרך קל וחומר אין להצדיק סטיות בפועל בצד טענה מילולית משוללת יסוד כאילו החוק והכללים מקוימים כהילכתם. מעל לכל ניצב זרקור אזהרה בולט המתריע, כי דיווח שקר הוא אם כל חטאת, וכי עליו להיעקר סופית מדרכי עבודת השב"כ.

אם חלה התפתחות לטובה, מאז סיום איסוף החומר לדוח זה יש לברך על כך. אם חלו שינויים בתנאי העבודה בהקשר למהלכי השלום, יתכן שחלק מתנאי העבודה של החוקרים שונים עתה מהמתואר כאן. אולם אין בכל אלה כדי להפחית מהצורך ללמוד את הנאמר בדוח זה ולפעול לפיו.